Supreme Court, U.S.
FILED
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No. ——

IN THE

Supreme Court of the United States

H.P.Y., INC.,

Petitioner,

v.

COMMONWEALTH OF PUERTO RICO, *et al.*

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Puerto Rico

PETITION FOR WRIT OF CERTIORARI

Of Counsel:

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June, 2000

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Mercado; David Mario Coffey Mercado; Maria Luisa Wilson Mercado; Margarita Maria Wilson Mercado; Richard Wilson Mercado; Manuel Vidro Diana; Israel Vidro Zayas; Mercedes Vidro Zayas; Juan Vila Castillo; José E. Villoch Ocasio; Ángel Zapata; ESTATE OF MARIO MERCADO RIERA – composed by: (a) Eufemia Eileen a/k/a Eileen Mercado Parra, (b) Adriana Luisa Mercado Parra, (c) Eileen Maria Coffey Mercado; (d) David Mario Coffey Mercado, (e) Maria Luisa Wilson Mercado, (f) Margarita Maria Wilson Mercado, y (g) Richard Wilson Mercado; Maricely Zapata Ruiz; the parties known as Fulano de Tal y Mengano de Cual, also all other citizens that acted in concert or in accord with the above mentioned codefendants and have joined in the land invasion and have built structures in the property or reside therein; in relation to the married defendants, whose spouses are unknown are hereby identified and designated as Fulana de Tal, John Doe; Fulano de Tal representing all the unknown defendants; FULANO DE TAL and MENGANO DE TAL, representing all those natural or judicial or legal parties whose addresses and domicile are unknown and who may have interest in the case; to the parties that were brought to the jurisdiction of the courts by the public notice published in the Puerto Rico newspaper El Dia on March 20,1986, in the present judicial proceedings; as well as the certified class whose default was noted on January 19, 1988; As well as all those parties, natural and/or legal who may have an interest, and who may have erected structures and/or had squaterred and/or had caused damages to the property HPY, INC. (Case Number CS851459)

QUESTIONS PRESENTED

1. Whether the rule of law prevails in Puerto Rico?

2. Whether denial, on grounds of unjust enrichment, of property owners' right to "just compensation" for structures built by bad faith trespassers violates the Fifth and Fourteenth Amendments of the United States Constitution?

3. Whether the Puerto Rico appellate court, lacking statutory jurisdiction, erred in interfering with a final, binding, and unappealable judgment, and disregarding a settled stipulation of the parties?

PARTIES TO THE PROCEEDING

There are no other parties to this proceeding besides those listed in the caption. Pursuant to Rule 29.1 of this Court, Petitioner states that it is a Delaware corporation that is not publicly traded, and it has neither a parent nor a subsidiary. Petitioner is owned by United States citizens who reside in the continental United States

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PETITION FOR WRIT OF CERTIORARI

Petitioner, H.P.Y., Inc., ("Petitioner"), respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Puerto Rico, denying a writ of certiorari to review the decision of the Circuit Court of Appeals of Puerto Rico, Ponce Regional Circuit, rendered on August 27, 1999.

OPINIONS AND ORDERS BELOW

The following opinions and orders are not reported, and are reprinted, in translation, in the Appendix to this Petition:

Decision of the Court of First Instance, Ponce Superior Division, rendered on June 4, 1991 (App. at 1a);[1]

Decision of the Court of First Instance, Ponce Superior Division, entered on January 22, 1997 (App. at 25a);[2]

Decision of the Court of First Instance, Ponce Superior Division, entered on August 5, 1998 (App. at 31a);

Decision of the Court of First Instance, Ponce Superior Division, entered on August 14, 1998 (App. at 34a);

Decision of the Circuit Court of Appeals, Ponce Regional Circuit, rendered on August 27, 1999 (App. at 50a);

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[1] All documents included in the Appendix are originally in Spanish. For convenience of the Court, these documents have been translated into English.

[2] This Order was entered based upon a Stipulation on the Designation of a Special Commissioner, executed by the parties on January 17, 1997 (App. at 18a)

Decision of the Supreme Court of Puerto Rico, rendered on January 21, 2000 (App. at 95a);

Decision of the Supreme Court of Puerto Rico, rendered on February 25, 2000 (App. at 96a); and

Decision of the Supreme Court of Puerto Rico, rendered on March 17, 2000 (App. at 97a).

JURISDICTION

On January 21, 2000, the Supreme Court of Puerto Rico declined to issue a writ of certiorari to review the decision of the Circuit Court of Appeals of Puerto Rico, Ponce Regional Circuit. On February 25, 2000, the Supreme Court of Puerto Rico denied Petitioner's motion for reconsideration. On March 17, 2000, the Supreme Court of Puerto Rico denied Petitioner's second motion for reconsideration. This Court has jurisdiction to review the judgments and orders of the Supreme Court of Puerto Rico and Circuit Court of Appeals of Puerto Rico under 28 U.S.C. § 1258.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part that:

> "No person shall. . .be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

> of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

3. Article II, Sec. 7 of the Constitution of the Commonwealth of Puerto Rico provides in relevant part that:

> "It is recognized as a fundamental right. . .the right to life, liberty and the enjoyment of property. No person shall be deprived of his liberty or property without due process of law, and no person in Puerto Rico shall be denied equal protection under the law. No laws shall be enacted that undermine contractual obligations."

4. Article II, Sec. 9 of the Constitution of the Commonwealth of Puerto Rico provides in relevant part that:

> "No private property shall be taken for public use without just compensation and in the manner prescribed by law."

5. The Statutes of the Commonwealth of Puerto Rico, 31 L.P.R.A. § 1165, provide in relevant part:

> "He who builds, plants, or sows in bad faith on another's land, loses what he has built, planted or sown, without having any right to indemnity."[3]

6. Article 4.002 of the Judiciary Act of Puerto Rico, 4 L.P.R.A. § 22K, provides in relevant part:

> The writ of certiorari shall be executed by filing a petition to such effects within thirty (30) days following the date the copy of the notice of resolution is filed of record in the case. This term is jurisdictional.

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[3] Translation of this statute Appears in *Amezquita v. Hernandez-Colon*, 581 F.2d 8, 13 (1st Cir. 1975).

7. Rule 32 of the Rules of the Circuit Court of Appeals of Puerto Rico 4 L.P.R.A. App. XXII, A, R.32, provides in relevant part:

> The writ of certiorari shall be executed by filing a petition to such effects within thirty (30) days following the date the copy of the notice of resolution is filed of record in the case. . . . The term provided herein shall be of strict compliance except when there are special duly-grounded circumstances in the writ of certiorari.

8. Article 1204 of the Civil Code of Puerto Rico, 31 L.P.R.A. §3343, provides in relevant part:

> In order that the presumption of res adjudicata may be valid in another suit, it is necessary that, between the case decided by the sentence and that in which the same is invoked, there be the most perfect identity between the things, causes, and persons of the litigants, and their capacity as such.

STATEMENT OF THE CASE

This case should be of great interest to this Court. It involves the largest land invasion in the history of Puerto Rico[4]

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[4] The Chief Judge of the United States District Court for the District of Puerto Rico observed nearly 30 years ago in *Santiago-Rodriguez v. Torres-Massa*, 342 F.Supp. 1152, 1153 (D.P.R. 1972):

> Due to many and various reasons which we need not elaborate but which include overpopulation, unfulfilled expectations, and the need of many to have a home of their own, together with the unavailability of housing at a cost which the poor of Puerto Rico can afford, Puerto Rico has experienced during the past year or so a series of incidents which have become known as land invasions. These are characterized mainly by a group of homeless persons accompanied in some occasions by a sprinkling

and certain outrageous[5] conduct in the ensuing litigation by the Commonwealth of Puerto Rico. The trespassers usurped an area of more than three hundred (300) *cuerdas*[6] of real estate, where more than three thousand (3,000) families invaded the land and built houses. Among the owners of the illegally occupied land is the Petitioner, H.P.Y., Inc., a corporation organized under the laws of Delaware with its principal place of business in Winter Park, Florida. H.P.Y., Inc. has been litigating for 15 years to receive just compensation for what this Court has recognized as the "special kind of injury [that an owner suffers] when a stranger directly invades and occupies the owner's property."[7]

The invasion began in 1985, when a group of squatters commenced their trespass, in bad faith, on Petitioner's land and other adjacent land owners. The invasion spread rapidly, and had the potential of becoming a problem of public order. In response, the Commonwealth of Puerto Rico and the Regulations and Permits Administration (ARPE, as known by its Spanish acronym) filed a motion in the Superior Court of Ponce for provisional injunction against the squatters and the owners of the land. They alleged in the motion that the

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> of speculators, who will occupy a parcel of rural land and build their homes on the land. . . .

[5] The Court of First Instance held (App. at 36a, 43a, 48a) that the Commonwealth of Puerto Rico was responsible for "assuming an unlawful position and causing procedural confusion. . . . [T]he Government is accused of bad faith in the circumstances of this case. . . . [The] conduct . . .[of the Commonwealth of Puerto Rico] can be categorized as reckless, obtuse and intransigent." On Appeal, the Circuit Court of Appeals of Puerto Rico stated that "we respect the decision of the Court of First Instance that the procedural conduct shown by the Commonwealth of Puerto Rico in this case was reckless and contradictory." (App. at 84a).

[6] A *cuerda* is 3930.396 square meters in area, slightly less than an acre.

[7] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982).

buildings constructed by the squatters were violating ARPE laws and that the construction was being carried out in common agreement with the landowners and with the approval of same. The landowners strenuously denied these allegations.

In view of these events, that same year, both H.P.Y., Inc. and the Mario Mercado Estate filed a lawsuit against the squatters in the Superior Court of Ponce, in which they requested that the squatters be certified as a class of defendants, that a injunction for possession be issued, and that an order for precarious eviction be entered against the squatters.[8] The Court certified the defendants as a class. While the litigation was pending, the number of squatters rapidly increased.

In 1988, three years after the invasion began, the Commonwealth of Puerto Rico filed in the Expropriations Court a Petition of Expropriation of 199 *cuerdas* of land belonging to the Mario Mercado Estate. H.P.Y., Inc. tried to intervene in that case on three separate occasions, alleging that the Commonwealth had included a large part of its land in the plan submitted to the Court with the Petition for Expropriation. The Commonwealth opposed the intervention of H.P.Y., Inc., and the Court of Expropriations denied the requests for intervention finding that the Commonwealth did not have any intention to expropriate land belonging to H.P.Y., Inc. The Expropriations Court ordered the Commonwealth to correct the plan to reflect that the land of H.P.Y., Inc. was not part of the expropriation, but the Commonwealth never made the correction.

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[8] The government's lawsuit and Petitioner's lawsuit were consolidated into a single case. However, one land owner in the consolidated action, Alfonso A. Hernandez Ortiz, was successful in evicting approximately 32 squatters in 1997 and Mr. Hernandez Ortiz was removed from the case.

Also during 1988, incredibly, three public corporations (the Electric Power Authority, the Aqueduct and Sewer Authority and the Rural Housing Administration), using federal funds,[9] started to build infrastructure on the land belonging to the Mario Mercado Estate, which had been expropriated, and the land belonging to H.P.Y., Inc., which had not been expropriated. In other words, while the Commonwealth refused to grant H.P.Y., Inc. just compensation for its plots of land, these public corporations were invading H.P.Y., Inc.'s land, and taking the land from H.P.Y., Inc. without just compensation, with the approval of the Commonwealth.

Due to the actions of the government through these public corporations, H.P.Y., Inc.[10] had no other remedy[11] than to continue with its lawsuit for possessory injunction, precarious eviction and accession. On June 4, 1991, the Superior Court of Ponce entered judgment in the consolidated action, ordering the squatters to cease and desist from disturbing the plaintiffs in the possession of the property in question, and to vacate the property of the plaintiffs, leaving it free and clear in favor of the legitimate owners.[12] The Court also

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[9] Petitioner's Puerto Rican counsel has received documents showing that several million dollars were spent on infrastructure by the Electric Power Authority, a government owned corporation.

[10] The Mario Mercado Estate also remained a plaintiff in the consolidated action because it owned 17 cuerdas of land that had not been expropriated by the government, but were usurped nonetheless.

[11] H.P.Y., Inc. filed a civil action in the United States District Court for the District of Puerto Rico under 42 U.S.C. § 1983 against the Electric Power Authority, the Puerto Rico Aqueduct and Sewer Authority, and the Rural Housing Administration, alleging that these public agencies aided and abetted the squatters. This suit was dismissed and the dismissal was affirmed by the First Circuit in 1993 (App. at 98a).

[12] It is important to remember that in a different case in the Expropriations Court, the Commonwealth of Puerto Rico had expropriated 199 *cuerdas* of land belonging to the Mario Mercado Estate, which was

determined that, since the squatters never acted in good faith in illegally possessing the invaded land, they lost ownership in the buildings and infrastructure in accordance with the statutes of Puerto Rico.[13] This judgment was duly noticed to all the parties, including the Commonwealth of Puerto Rico, and in order to give notice to the squatters, it was published in a newspaper of general circulation in Puerto Rico. No one made a timely request for reconsideration of the judgment or filed a timely notice of Appeal or petition for certiorari. Hence, the judgment became final, binding, and not subject to appeal.

At the moment the Court of First Instance was ready to execute the judgment to evict the trespassers, the Commonwealth filed an objection alleging that there was a discrepancy in the boundaries and, therefore, the eviction should not be carried out. H.P.Y., Inc. replied that the government's position was contrary to positions it had taken in the expropriation suit, in which the government had stated that the property to be expropriated did not include any land belonging to H.P.Y., Inc. In order to resolve the dispute, the Court of First Instance appointed a court expert, Julio Rios, a professor of surveying at the University of Puerto Rico. On

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part of the land covered by the invasion. Therefore, on July 2, 1991, the Commonwealth of Puerto Rico requested a *nunc pro tunc* amendment to the judgment that had been handed down so that the judgment would exclude from execution of the judgment the 199 *cuerdas* of land expropriated by the Commonwealth from the Mercado Estate. On April 10, 1992, the Superior Court issued an order to execute the judgment which excluded the 199 *cuerdas* of land already expropriated by the Commonwealth of Puerto Rico. However, another 17 *cuerdas* of land belonging to the Mario Mercado Estate, and the 90 *cuerdas* of land belonging to H.P.Y., Inc. were not excluded, and were thus covered by the Judgment.

[13] See Statutes of the Commonwealth of Puerto Rico, 31 L.P.R.A. §1165, cited above.

July 28, 1992, the expert submitted his report which confirmed the position of H.P.Y., Inc. that the Commonwealth had included its land in the petition for expropriation.

However, the Commonwealth ignored the expert's report. The position of the Commonwealth was not based on the rule of law, but on political considerations. The more than 3,000 bad faith trespassers represented a substantial voting bloc in the upcoming 1992 elections. Pre-election opinion polls showed the election was a dead heat. The ruling party feared a loss of power. Thus, the government continued to oppose the eviction of the squatters and requested that the Court of First Instance at Ponce stay the eviction order until the Expropriations Court could determine the boundaries of the expropriated property. The Court of First Instance stayed the eviction order on the grounds that the Expropriations Court had exclusive jurisdiction to determine the boundaries of an expropriated property. On December 8, 1995, the Expropriations Court entered a judgment providing that the government had expropriated 199 *cuerdas* of land belonging to the Mario Mercado Estate and that the property of H.P.Y., Inc. was not included in the expropriated area.[14]

Because the judgment of the Expropriations Court clarified the boundaries of the expropriated property, on February 22, 1996, H.P.Y., Inc. again requested the Court of First Instance at Ponce, in the consolidated action, to immediately evict those who had usurped its property. Surprisingly, the government once again opposed the eviction request, arguing that when it filed its petition for expropriation in 1988, its intention was to expropriate all of the invaded land for the benefit of the squatters, reversing its earlier positions in an

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[14] The judgment was based on a settlement between the Commonwealth and the Mario Mercado Estate.

apparent attempt to deny Petitioner's rights. Thus, the Commonwealth continued to make self-contradictory arguments, for it had consistently argued in the Expropriations Court that it had no intention of expropriating any land belonging to H.P.Y., Inc. and the only expropriation was 199 *cuerdas* of land belonging to the Mario Mercado Estate.

There were long hearings in the consolidated action in the Court of First Instance at Ponce during March to May 1996. Then, on May 14, 1996, Mr. Leandro Peña, Assistant Secretary of the Department of Housing and Executive Director of the Housing Development and Improvement Administration, made an institutional commitment and a formal promise, in open court, on behalf of the Commonwealth of Puerto Rico, to acquire the physical improvements and the invaded land that had not been expropriated in accordance with applicable law as determined by the Court of First Instance at Ponce (the 17 *cuerdas* of land belonging to the Mario Mercado Estate and the 90 *cuerdas* of land belonging to H.P.Y., Inc.).[15] As discussed below, the Court of First Instance at Ponce later concluded that the Commonwealth of Puerto Rico agreed to acquire the private properties, with all the consequence of accession, compensation and appraisal derived from judgment and the law.[16]

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[15] This commitment is discussed in the decision of the Circuit Court of Appeals of Puerto Rico dated August 27, 1999, at p. 25 (App. 74a). The Commonwealth made a partial payment of compensation of $2,000,000 to Estate of Mercado and H.P.Y., Inc., which was divided equally among them.

[16] Decisions of the Court First Instance, Ponce Superior Division entered on August 5 and 14, 1998, App. at 31a and 34a.

On January 22, 1997, the Court of First Instance at Ponce issued an order,[17] based upon a stipulation[18] between the Commonwealth and H.P.Y., Inc., designating Domingo Raffucci, a former judge of the Expropriations Court, as Special Commissioner to settle the following disputes: (a) the value of the land as of the date of May 15, 1996; (b) the value of the buildings located on the land, subject to determination by the Court on the appropriateness of compensation; and (c) the value of the infrastructure, subject to determination by the Court on the appropriateness of compensation. Incredibly, the Commonwealth reneged on its formal commitment to acquire the land invaded by the squatters (including the houses and the infrastructure). The Commonwealth's commitment had been embodied in a stipulated order, and the order had become final, binding, and not subject to appeal. However, the Commonwealth reversed its position, and took the opposite position that its commitment was only to compensate the owners for the land per se, not for the houses or the infrastructure.

In July, 1997, the Special Commissioner submitted his report on the appraisal of the 90 *cuerdas* of land belonging to H.P.Y., Inc., determining that the value per *cuerda* of the 90 *cuerdas* of land (not including the illegally built structures) was $37,982.16, for a total of $3,418,508.80. The Court of First Instance, in its ruling of August 5, 1998,[19] approved the report submitted by the Special Commissioner, and in its ruling of August 14, 1998,[20] reiterated that the owners had the right to just compensation for the invaded land and also for the structures erected on the land, since these lands and

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[17] App. at 25a.

[18] App. at 18a.

[19] App. at 31a.

[20] App. at 34a.

structures belonged to them by accession,[21] as the trespassers had acted in bad faith.

The Commonwealth appealed these rulings in a Petition of Certiorari to the Circuit Court of Appeals of Puerto Rico on October 5, 1998. Both H.P.Y., Inc. and the Mario Mercado Estate opposed the appeal. On August 27, 1999, the Circuit Court of Appeals of Puerto Rico issued a decision[22], in which it purported to set aside, without jurisdiction to do so, the final and binding judgment of June 4, 1991, and improperly amended the stipulation signed by the Commonwealth and H.P.Y., Inc. more than two years previously.[23] This decision stated that the landowners, for reasons of unjust enrichment, did not have a right to compensation for the trespassers' buildings or infrastructure erected on their land (theirs by accession). The Circuit Court of Appeals of Puerto Rico also changed the stipulated date to determine the value of the expropriated land to November 3, 1988, some 8 years earlier, setting aside the date of May 15, 1996, which date H.P.Y., Inc. and the Commonwealth had stipulated to as the date to determine the value.[24] The Court did this unilaterally, because the government, as appellant, never asked the date to be changed. In addition, the Court of Appeals altered or modified the contract of the parties as an appellate court and not as a court of equity deciding the issue as a court of first instance.

On December 2, 1999, Petitioner filed a timely petition for appeal or certiorari in the Supreme Court of Puerto Rico from

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[21] This was the ruling in the final judgment dated June 4, 1991, App. at 16a.

[22] App. at 50a.

[23] Stipulation dated January 17, 1997 (App. at 18a)

[24] App. at 27a.

the decision of the Circuit Court of Appeals of Puerto Rico. On January 21, 2000, the Supreme Court of Puerto Rico dismissed Petitioner's petition. Thereafter, the Petitioner filed two timely motions for reconsideration, the last of which was denied by the Supreme Court of Puerto Rico on March 17, 2000.

REASONS FOR GRANTING THE WRIT

I. The Opinion Below Conflicts With Decisions of This Court and the United States Court of Appeals for the First Circuit, and Raises Important Questions Concerning Fair Play, Protection of Constitutional Rights, and Whether the Rule of Law Prevails in Puerto Rico

Since 1987, this Court has been moving in the direction of greater protection of property rights.[25] Property rights, and, in particular, rights in land, have always been fundamental to, and part of, the preservation of liberty and personal freedom in the United States.[26] In its recent decisions, this Court has been taking a pro-privatist stance and strengthening the Fifth Amendment's takings clause.[27] As a result, heightened scrutiny must be applied to the decision of the Circuit Court of Appeals of Puerto Rico in this case.

This case involves the largest known land invasion in Puerto Rican history. The decisions of the appellate courts in Puerto Rico, as they pertain to the facts of this case, raise

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[25] Hon. Leon D. Lazer, "The Supreme Court's Land Use Decisions," 11 Touro L. Rev. 421 (1995).

[26] Callies, D. L., "Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts Are Doing About It," 28 Stetson L. Rev. 523, 526 (1999).

[27] Watson, M. S., "The Scope of the Supreme Court's Heightened Scrutiny Takings Doctrine," 20 Whittier L. Rev. 181, 209 (1998).

serious questions about whether the rule of law prevails in Puerto Rico.[28] The right to just compensation for homes and infrastructure built by bad faith trespassers contained in a final, binding and unappealable judgment was abrogated by an appellate court without jurisdiction. This decision abrogated 100 years of statutory law in Puerto Rico.[29] In addition, an appellate court freed one party from a contractual stipulation even though neither party sought a reformation in equity before the lower court or the appellate court. The result of the decision, if left unreviewed and unchanged, will be that the Puerto Rican appellate courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment,[30] *First Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 311 (1987)(California courts decided the compensation question inconsistently with the requirements of the Fifth Amendment).

Government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), quoted with approval in *First Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987). When the government initiates

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[28] Senator John W. Warner of Virginia, in a speech on the Senate floor last year, referring to trespassers who built houses at the U.S. Naval base on Vieques Island, Puerto Rico, in a similar manner to this case, criticized the "unrestrained civil disobedience, in defiance of law" in Puerto Rico, as quoted in The *Virginian-Pilot*, Norfolk, VA, October 30, 1999.

[29] See Statutes of the Commonwealth of Puerto Rico, 31 L.P.R.A. §1165, cited above.

[30] The Due Process Clause and other constitutional provisions are Applicable in the Commonwealth of Puerto Rico in the same manner as they Apply to the States. *Riviera-Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 7 (1982).

condemnation proceedings, it concedes the landowner's right to receive just compensation and seeks a mere determination of the amount of compensation due, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 712 (1999). H.P.Y., Inc. had acquired ownership of the buildings and infrastructure built on invaded land by statute[31] and by the right of accession set forth in the final, binding and unappealable judgment dated June 4, 1991.[32] The Circuit Court of Appeals of Puerto Rico disregarded the law of the case, the statutes of Puerto Rico,[33] and, more importantly, the stipulation of the parties[34] to conclude, improperly, that the doctrine of unjust enrichment prevented the Petitioner from being compensated for structures built by bad faith trespassers.

For Fifth Amendment and due process reasons, the Court of Appeals of Puerto Rico could not revoke the rights to just compensation for the buildings and infrastructure that had already been acquired in a final and binding judgment. The decision of the Puerto Rico Court of Appeals to deny

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[31] See Statutes of the Commonwealth of Puerto Rico, 31 L.P.R.A. §1165, cited above.

[32] App. at 16a. The decision of the Circuit Court of Appeals of Puerto Rico dated August 27, 1999, at pp. 15-16, recognized that the Court of First Instance on June 4, 1991 "concluded that the properties had been subject to illegal invasion and that the squatters did not have title to the properties. It determined that the occupants were builders in bad faith, since they did not have any right whatsoever to continue in possession of their homes. The Court ordered eviction of the squatters from the property." (App. at 65a). However, the Court of Appeals chose to ignore that ruling because of "the imposition on the Government of a payment of millions of dollars for these items," ibid., p. 38 (App. at 86a), clearly violating Petitioner's constitutional rights.

[33] See text accompanying footnote 3, supra.

[34] App. at 18a.

Petitioner's right to compensation for the buildings and infrastructure also conflicts with the ruling of the United States Court of Appeals for the First Circuit in *Amezquita v. Hernandez-Colon*, 518 F.2d 8, 13 (1st Cir. 1975)(Puerto Rican trespassers do not own homes built on invaded land,[35] and thus have no protected property or privacy interests). In that case, it should be noted that the Commonwealth of Puerto Rico had argued that squatters do not own homes built on invaded land, a position directly at odds with the Commonwealth's position in this case.

In addition, the Court of Appeals of Puerto Rico did not have jurisdiction to review the judgment of June 4, 1991, for reasons set forth in Article 4.002 of the Judiciary Act of Puerto Rico[36] and Rule 32 of the Rules of the Circuit Court of Appeals of Puerto Rico,[37] because there must be a timely appeal. There was no timely appeal by the Commonwealth of the earlier judgment and, hence, the Circuit Court of Appeals of Puerto Rico could not intervene in that judgment. It also violated the principle of *res judicata* established in Article 1204 of the Civil Code of Puerto Rico.[38]

The Circuit Court of Appeals of Puerto Rico seized on the doctrine of unjust enrichment, because it thought that the government's obligation to pay Petitioner for the buildings and infrastructure would cost too much money.[39] Apparently,

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[35] See text accompanying footnote 3, supra, citing the statute "He who builds...in bad faith on another's land, loses what he has built..."

[36] 4 L.P.R.A. § 22K.

[37] 4 L.P.R.A. App. XXII, A, R.32.

[38] 31 L.P.R.A. § 3343.

[39] The decision of the Circuit Court of Appeals of Puerto Rico dated August 27, 1999, at p. 38, expresses concern about "the imposition on the Government of a payment of millions of dollars..." (App. at 86a).

the Circuit Court of Appeals of Puerto Rico thought it was protecting the public purse strings. However, such a purpose runs counter to the constitutional requirement of just compensation. This Court has made it clear that "a strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922), quoted with approval in *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994).

The Circuit Court of Appeals of Puerto Rico, exceeding its jurisdiction, also improperly changed the date of determining the value of the expropriated land to November 3, 1988, some 8 years earlier, setting aside the date of May 15, 1996, which date H.P.Y., Inc. and the Commonwealth had stipulated to as the date to determine the value.[40] This decision was erroneous for several reasons. This issue was not before the court because the Commonwealth did not raise it on appeal. The Commonwealth never sought to change the 1996 date. Furthermore, the Commonwealth would have been precluded from raising this issue on appeal by the doctrine of cases such as *United States v. Zenon*, 711 F.2d 476, 478 (1st Cir. 1983)(Breyer, J.)(we hold appellants to the basic rule that an issue not presented to the district court cannot be raised for the first time on appeal). Here, the decision was more egregious because the appellate court raised and applied this theory sua sponte and without jurisdiction.

A settled stipulation to use the 1996 date is a contract between the parties, which obligates them to comply with same. Thus, once the parties have consented, the stipulation cannot be changed by an appellate court. Here, the stipulation was not only an agreement of the parties, it was also approved

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[40] App. at 27a.

by an order of the Court of First Instance in Ponce.[41] That order became final, binding and not subject to appeal.

Finally, the valuation of property which has been taken must be calculated as of the time of the taking, *First Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 320 (1987). Between 1988 and 1996, the Commonwealth maintained in the expropriation proceedings involving Estate of Mercado's 199 *cuerdas* of land that it had no intention to expropriate the land of H.P.Y., Inc. Therefore, use of the 1988 date for a government taking is inconsistent with the Commonwealth's position in the expropriation litigation.

Throughout the 15 years of litigation over this land invasion, the Commonwealth of Puerto Rico has tolerated and encouraged the illegal actions of the squatters, and obstructed legal proceedings brought by the property owners, in effect protecting the squatters for political reasons, in total disregard of the law and Petitioner's constitutional rights. It is highly unusual for a government to protect trespassers. Thus, Petitioner was treated in an unfair and irrational manner by the government. See, e.g. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 699 (1999)(Del Monte Dunes emphasized the shifting and sometimes inconsistent positions taken by the city throughout the process, and argued that it had been treated in an unfair and irrational manner by the government). Add to this the fact that the Circuit Court of Appeals of Puerto Rico modified a final and binding judgment and amended a stipulation between the parties, which had the approval of the Court of First Instance at Ponce. These events violated the rule of law that governs Puerto Rico in terms of property law, final and binding judgments, and settled stipulations, resulting in

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[41] App. at 25a.

Petitioner's constitutional rights being ignored and violated. They raise troubling questions about fundamental fairness and due process of law, which cry out for review by this Court.

CONCLUSION

Because the decision of the court below raises serious questions about whether the rule of law prevails in Puerto Rico and whether the question of compensation for a taking was decided inconsistently with the requirements of the Fifth and Fourteenth Amendments, a writ of certiorari should issue to review the decision below. If left unreviewed, legal chaos will continue in Puerto Rico with respect to property rights, and whether appellate courts on appeal may interfere with final, binding, and unappealable judgments, and disregard, or modify and alter, settled stipulations of the litigants. This is an opportunity for the Court to send a clear message that land invasions will not be tolerated in Puerto Rico or elsewhere in the United States.

Respectfully submitted,

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June, 2000

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APPENDIX A

IN THE GENERAL JUSTICE COURT OF PUERTO RICO
SUPERIOR COURT—PONCE DIVISION
JUDICIAL CENTER

CIVIL NO. CS85-1459

IN RE: TEMPORARY INJUNCTION

COMMONWEALTH OF PUERTO RICO ET AL.
Plaintiffs

v.

ESTATE OF MARIO L. MERCADO, ET AL.,
Defendants

CIVIL NO. CS86-2817

RE: EVICTION ACTION FOR
UNLAWFUL DETAINER AND ACCESSION

ALFONSO A. HERNANDEZ ORTIZ, ET AL.
Plaintiffs

v.

MODESTO HERNANDEZ ET AL.,
Defendants

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDGMENT

As the present cases have been called to hold the trial on the merits regarding them, come now: (A) (I) THE ESTATE OF MARIO MERCADO RIERA - made up of : (a) Eufemia

Eileen known as Eileen Mercado Parra, (b) Adriana Luisa Mercado Parra, (c) Eileen Maria Coffey Mercado, (d) David Mario Coffey Mercado, (e) Maria Luisa Wilson Mercado, (f) Margarita Maria Wilson Mercado, and (g) Richard Wilson Mercado - (civil Number CS85-1459 and CS86-2817) ("ESTATE OF MARIO MERCADO RIERA"), (II) HPY, INC. (Civil Number CS85-1429), (III) ALFONSO ANTONIO HERNANDEZ ORTIZ (Civil Number CS86-2817), hereinafter referred to as the "plaintiffs," represented by their attorneys; (B) the defendants in the above-captioned cases under the jurisdiction of this Court, some in default and others duly represented by their attorneys.

The plaintiffs in the cases of title interposed their pertinent evidence before the court; as did some of the defendants; this being the only evidence that was presented in the proceedings.

Having heard all of the evidence admitted from what has been offered, this Court makes the following:

FINDINGS OF FACT

1. The plaintiffs and their predecessors in title have had ownership and also title in fee simple recorded in the Property Registry for the following property. Said title and ownership has been the during the year immediately prior to the filing of the complaint and in prior years, to wit:

(a) THE ESTATE OF MARIO MERCADO RIERA, composed of: (a) Eufemia Eileen known as Eileen Mercado Parra, (b) Adriana Luisa Mercado Parra, (c) Eileen Maria Coffey Mercado, (d) David Mario Coffey Mercado, (e) Maria Luisa Wilson Mercado, (f) Margarita Maria Wilson Mercado, and (g) Richard Wilson Mercado (Civil Number CS85-1459 and CS86-2817). Said title and ownership have been during the year immediately prior to the filing of the complaint and

the remaining prior years. The property of mention is described in the registry as follows:

—Parcel MT-FOUR, RURAL: Located in Canas Ward in the municipal district of Ponce, Puerto Rico with an area of SEVEN HUNDRED FIFTY-FIVE CUERDAS FIFTY-EIGHT ONE-HUNDREDTHS, equivalent to two hundred fifty-seven hectares, sixty-six ares, ninety-one centares and six hundred thirty-two millares, made up of the following portions:

—Portion A: Rural: Located in Canas Ward in the municipal district of Ponce, with an area of two hundred forty-six cuerdas seventy-three one-hundredths, equivalent to ninety-six hectares, ninety-seven ares, forty-seven centares and five hundred ninety-two millares, bounded on the North by state highway number two, in ten alignments that total fifty-eight point ninety-nine meters; on the East by land belonging to the Puerto Rico Aqueduct and Sewer Authority; Regional office in four alignments that total one hundred seventy-two point seventy-one meters with the portion MT-Three-Plains for an alignment of seven hundred twenty point forty-one meters; on the South by the Caribbean Sea for thirty-five alignments that total two thousand forty-seven point seventy-three meters and on the West by the Laguna de las Salinas for seven alignments that total one thousand one hundred ninety-eight point sixty-seven meters. This portion is identified in the subdivision map as parcels MT-Four-Plains-A for one hundred eighty-five cuerdas ninety-eight one-hundredths and MT-Four-Plains-B, sixty cuerdas seventy-five one-hundredths.

—Portion B: Rural: Located in Canas Ward in the municipal district of Ponce, with an area of thirty-seven cuerdas seventy-three one-hundredths,

equivalent to fourteen hectares, eighty-two ares, ninety-three centares and nine hundred ninety-two millares, bounded on the North by the portion MT-Three-Industrial of Parcel MT-Three for an alignment of two hundred seventy-one point twenty-four meters; on the East by property belonging to the Puerto Rico Social Programs for eighteen alignments that total five hundred seven point ninety-seven meters; on the South by State Highway number two, in two - alignments that total two hundred sixty-six point seventy-six meters and on the West by the portion MT-Three-Escarpment of parcel MT-Three for an alignment of four hundred eighty point twelve meters. This portion is identified in the subdivision map as parcel MT-Four-Industrial.

—Portion C: Rural: Located in Canas Ward in the municipal district of Ponce, with an area of three hundred seventy-one cuerdas twelve one-hundredths, equivalent to one hundred forty-five hectares, eighty-six ares, fifty centares and zero forty-eight millares, on the North by land belonging to Empresas Ferré for ten alignments that total nine hundred fifty-eight point ten meters, by land belonging to Nicolás Pagán for five alignments that total two hundred ninety-seven point twenty-seven meters by land belonging to Empresas Ferré for twenty-seven alignments that total seven hundred point fifty-nine meters and by land belonging to Dr. Humberto Zayas Chardón for five alignments that total two hundred eighty-three point forty-one meters; on the East, by land belonging to Punto Oro Development or for four alignments that total one thousand four hundred forty-seven point nine meters; on the South, by land belonging to Ponce West Industrial Area and land, belonging to Social Programs for thirteen alignments that total four hundred eighty-nine point ten meters and by land

belonging to the Puerto Rico Land Management for fourteen alignments that total two thousand twenty-three point thirty-four meters; and on the West, by the Portion MT-Three-Escarpment of Parcel MT-Three, for an alignment of one thousand two hundred five point seventy-five meters. This portion is identified in the subdivision map as MT-Four-Escarpment.

—This has been previously recorded under property number 46,412 for Ponce I, presently number 1981 for Ponce II, and is described on page 115 of volume 1529 for Ponce I, first entry; and on page 115 of volume 669 for Ponce II.

From the property described above the following portion is the subject of this consolidated litigation:

—Portion C: Rural: Located in Canas Ward in the municipal district of Ponce, with an area of three hundred seventy-one cuerdas twelve one-hundredths, equivalent to one hundred forty-five hectares, eighty-six ares, fifty centares and zero forty-eight millares, bounded on the North by land belonging to Ferré Enterprises for ten alignments that total nine hundred fifty-eight point ten meters, by land belonging to Nicolás Pagán for five alignments that total two hundred ninety-seven point twenty-seven meters by land belonging to Ferré Enterprises for twenty-seven alignments that total seven hundred point fifty-nine meters and by land belonging to Dr. Humberto Zayas chardón for five alignments that total two hundred eighty-three point forty-one meters; on the East by land belonging to Punto Oro Development or for four alignments that total one thousand four hundred forty-seven point nine meters; on the South by land belonging to Ponce West Industrial Area and land belonging to Social Programs for thirteen alignments that total four hundred eighty-nine point ten meters

and by land belonging to the Puerto Rico Land Management for fourteen alignments that total two thousand twenty-three point thirty-four meters; on the West by Portion MT-Three-Escarpment of Parcel MT-Three, for an alignment of one thousand two hundred five point seventy-five meters. This portion is identified in the subdivision map as MT-Four-Escarpment.

The ESTATE OF MARIO MERCADO RIVERA has had ownership of and title to said property with exclusivity over the prior partners of the Mario Mercado and Sons Partnership in accordance with the RULING issued by the Honorable Superior Court Judge, Victor Vargas Negrón, since December 23, 1976, in virtue of the adjudication made by this same Court in the Case CS57-2295, on the Dissolution of Partnership; this property having been consolidated with others under judicial trusteeship in said case.

(b) HPY, INC. (Civil Number CS89-1459) a corporation organized under the laws of the State of Delaware, United States of America and authorized to do business in Puerto Rico and registered with the Department of State for the Commonwealth of Puerto Rico. The properties mentioned are described in the registry as follows:

(A) —RURAL: A parcel located in canas Ward in the municipal district of Ponce, Puerto Rico with a surface area of TWENTY-SIX POINT SIX THOUSAND SEVEN HUNDRED TWENTY CUERDAS, equivalent to ONE HUNDRED FOUR THOUSAND EIGHT HUNDRED FORTY POINT THREE THOUSAND EIGHT HUNDRED EIGHTY-THREE SQUARE METERS (104,840.3883). On the North by part of the main property in two directions from which the ninety cuerdas were subdivided of which the present is a remainder, land belonging to the Trustee-ship of the Mario Mercado and Sons

Partnership, in the first direction for a distance of nine hundred fifty-six point fifteen meters, and in the second direction for a distance of two hundred seventy-three point four hundred ninety-six meters; on the South by and in one single direction and for a distance of one thousand one hundred eighty-eight point six hundred seventy meters by the parcel described with the letter "E" in the map made by the engineer Rafael Dosal Lines; on the East, in one single direction and distance of three point five hundred seventy-four meters, by the Punto Oro Development; and on the West, in one single direction and for a distance of one hundred two point eighty-five meters by land from the main property know as Hacienda Matilde, belonging to the Trusteeship of Mario Mercado and Sons Partnership and from which the parcel of fifty cuerdas was subdivided, of which this is a remainder. This parcel is marked "All in the subdivision map made by the engineer, Rafael Dosal Lines—The parcel described here is the remainder of the one with this number after deducting from its area of ninety cuerdas the parcels subdivided and that are indicated in the margin notes for the previous first recording.—Property: previously numbered 35,564 for Ponce I, presently number 5868 for Ponce II, is described on the back of page 165 of volume: previously 1263 for Ponce I, presently 521 for Ponce II.

(B) —RURAL: Parcel of land located in Canas Ward in the municipal district of Ponce, Puerto Rico with an area of ELEVEN POINT SIX THOUSAND SIX HUNDRED SIXTY-SIX CUERDAS equivalent to FORTY-FIVE THOUSAND EIGHT HUNDRED FIFTY-FOUR POINT FOUR THOUSAND FORTY-SIX SQUARE METERS (45,854.4046) , bounded on the North by a parcel identified by the letter (A) in the

subdivision map made by the engineer, Rafael Dosal Lines, in other words, by more land from the ninety cuerda parcel from which this parcel was subdivided, said boundary being a single alignment of one thousand one hundred fifty-five point three hundred fifty (1,155.350) meters; on the South in one single alignment of one thousand one hundred thirty-nine point three hundred eighty-seven meters, bounded by land subdivided from the ninety cuerda parcel identified as Parcel "B" in the above-mentioned map made by the engineer, Rafael Dosal Lines; on the East, in one single alignment of forty point fifteen meters bounded by the Punto Oro Development; and on the West in one single alignment of forty-one point five hundred four meters, bounded by more land from the main property known as Hacienda Matilde, property belonging to the Mario Mercado and Sons Partnership.

—Property: previously numbered 43,077 for Ponce I, presently number 5869 for Ponce II is described on page 111 of the volume: previously numbered 1440 for Ponce I, presently number 598 for Ponce II.

(C)—RURAL: Piece of land located in Canas Ward in the municipal district of Ponce, Puerto Rico with a surface area of ONE HUNDRED ELEVEN THOUSAND THREE HUNDRED FORTY-SEVEN SQUARE METERS AND FIFTY-FIVE CENTIMETERS (111,347.55) equivalent to TWENTY-EIGHT AND THREE THOUSAND THREE HUNDRED THIRTY-THREE ONE-THOUSANDTHS CUERDAS (28,3333) bounded on the North by the remaining sixty-one point six thousand six hundred sixty-seven cuerdas from the original ninety cuerdas, for a distance of one thousand one hundred thirty-nine point five hundred eighty-

seven meters (1,139.587) and in a direction of seventy-a distance of one thousand one hundred seventy point nine hundred seventeen meters by the parcel marked "All" on the map made by the engineer, Rafael Dosal Lines; on the South, in a single direction and for a distance of one thousand fifty-five point three hundred fifty meters by the parcel marked "C" on the above-mentioned map that was subdivided from the ninety cuerda property from which remainder this parcel is subdivided; on the East, in a single direction by land belonging to the Punto Oro Development for a distance of thirty-nine four hundred eighty-four meters; and on the West, in a single direction and for a distance of forty-one point zero sixty-five meters by property from the Hacienda Matilde, belonging to the Mario Mercado and Sons Partnership from which the ninety cuerdas were subdivided from which remainder this parcel is subdivided.

—Property: previously numbered 44,915 for Ponce I, presently number 5870 for Ponce II is described on page 282 of the volume: previously 1488 for Ponce I, presently 625 for Ponce II.

(E)—RURAL: Parcel located in Canas Ward in the municipal district of Ponce, Puerto Rico with a surface area of ELEVEN POINT SIX HUNDRED SIXTY-SIX (11.666) CUERDAS, equivalent to FORTY-FIVE THOUSAND EIGHT HUNDRED FORTY-NINE POINT THREE THOUSAND FIVE HUNDRED THIRTY-NINE METERS. Bounded on the North, in one single direction and for a distance of one thousand one hundred eighty-eight point six hundred seventy meters by the parcel marked "A" on the map made by the engineer, Rafael Dosal Lines; on the South, in a single direction and for a distance of

one thousand one hundred seventy point nine hundred seventeen meters by the parcel marked "D" on the above-mentioned subdivision map, and that was subdivided from the ninety cuerda property from which remainder the parcel described herein is subdivided; on the East, in a single direction by land belonging to the Punto Oro Development for a distance of thirty-eight point nine hundred ninety-three meters; and on the West in a single direction and distance of forty point two hundred forty-three meters by property from the Hacienda Matilde, belonging to the Trusteeship of the Mario Mercado and Sons Partnership from which the ninety cuerdas were subdivided from which remainder this parcel is subdivided.—Property: previously numbered 44,916 for Ponce I, presently number 9463 for Ponce II is described on page 290 of the volume: previously 1488 for Ponce I, presently 625 for Ponce II.

HPY, INC. has had ownership and title to said property in accordance with the law and title law as it appears in the Property Registry for Ponce II.

(c) ALFONSO ANTONIO HERNANDEZ ORTIZ (Civil Number CS86-2817). The property mentioned is described in the Property Registry as follows:

—RURAL: A parcel of land located in Canas Ward in the municipal district of Ponce, Puerto Rico, with an original surface area of One Hundred Fifty-Three Thousand Nine Hundred Twenty-Three Point Six Thousand Two Hundred Thirty-Six (153,923.6236) Square Meters, equivalent to Thirty-Nine Point one Thousand Six Hundred Twenty-one (39.1621) Cuerdas, that after Thirty-Five Thousand Three Hundred Seventy-Six Point One Thousand Seven Hundred (25,376.1700) (sic) Square Meters were subdivided, equivalent-to Nine Point Zero Zero Zero

Seven (9.007) (sic) cuerdas that formed property number twenty seven thousand one hundred eighty-eight (27,188), there remains One Hundred Eighteen Thousand Five Hundred Forty-Six Point Four Thousand Five Hundred Thirty-Six (118,546.4536) equivalent to Thirty Point One Thousand Six Hundred Fourteen (30.1614) cuerdas, bounded on the North by Street Number One (1) to be built from the Punto Oro Development and for a distance of One Hundred Fifty-Four Thousand Two Hundred Forty-Eight (154,248) lineal Meters; on the South, and in different alignments for a distance of Five Hundred Fifty Point Six Hundred Thirty-Seven (550.637) lineal meters by state highway number two (2) ("Ponce Bypass"); on the East for a distance of Eight Hundred Sixty-Nine Point Two Hundred Fifty-Seven (869.257) lineal meters by street Number one (1) of the Punto Oro Development and on the West in several Alignments and for a distance of Six Hundred Forty-Four Point Three Hundred Forty-One (644.341) by the Industrial Development El Tuque."

—Recorded on June 18, 1986 on the back of page 14 of volume 1,296 presently 540 for Ponce II, property number 31,640, presently 7,823, eighth entry, encumbered from its origin by a right-of-way in favor of the Commonwealth.

ALFONSO ANTONIO HERNANDEZ ORTIZ has had ownership and title to said property in accordance with the law and title law according to what appears in the Property Registry for Ponce II.

2. In accordance with the evidence presented and believed by this Court, the defendants in the instant case, without the express or implicit authorization of the plaintiffs, and without valid title or right of any nature, entered and encroached upon the above-mentioned pieces of land and

presently have built a series of shacks, huts and houses, having temporarily marked off what seems to be lots during the year 1985 and thereafter.

3. Previously this Court, and particularly in Civil Case CS86-2817, since June 4, 1987, had determined that any further additions or construction was, from then on, bad faith construction, which was subsequently ratified by this Court in its RULING of May 22, 1990 by the Honorable Superior Court Judge, Luis Muñiz Arguelles, in which this Court also established that "(1) good faith or bad faith is a subjective concept and it may be proven that on subsequent dates the owners do not have good faith."; this Court in accordance with the evidence presented and believed determines that the defendants never had good faith in the illicit ownership of the property that was encroached upon.

4. The plaintiffs acted promptly to protect their interests in the property by going to the State Police and the Courts of this jurisdiction.

5. Having examined the consolidated case file, heard and examined the evidence and the admissions against interest made by the defendants affiants; this Court concludes as a proven fact that there has been manifest temerity in the actions of the defendants during the entire process, both extrajudicial and judicial.

CONCLUSIONS OF LAW

The plaintiffs in the case cited have been the owners for more than one year of the property described above. Before the filing of the present complaint the plaintiffs were disturbed from the possession or ownership of the property described above, because the defendants through an "act of encroachment" and without the authorization of the plaintiffs illegally entered the above-mentioned property with the intention of possessing it.

An Injunction shall be granted to retain and recover material ownership of the property, at the behest of the interested party, provided that it shows to the satisfaction of the Court, that it has been disturbed from the possession or ownership of said property, by acts that show the intent of harassing or taking it away, or when said possession or ownership has already been taken away. Civil Procedure Code, 1933, Art. 690, 32 LPRA 3561.

In writs of possession, which is one of the actions that are exercised in the present case, only the question of possession is discussed, and not the right to said possession, nor the title of ownership to the property involved in the writ. *Rivera v. Carcel*, 68 DPR 365; *Mena v. Llerandi.*, 70 DPR 176; *Maldonado v. Colón*, 68 SPR 340; *Manrigue v. Alvarez*, 58 DPR 74; *Gómez v. López* 55 DPR 813; *De Los Santos v. Seijo*, 53 DPR 442; *Pueblo v. Fajardo Sugar Growers Ass.*, 45 DPR 380; *Figueroa v. Lugo y El Pueblo*, 43 DPR 865; *Fajardo Sugar v. Central Pasto Viejo*, Inc. , 41 DPR 825; *Fernández v. González* 41 DPR 726.

The main point in the Writ of Possession is always just a question of material and physical possession as far as occupancy is concerned, never a question of possession or right in civil possession, whether implied or legal. *Pérez v. Castro*, 52 DPR 573 and has the purpose of the protection of the fact of possession, without harming the rights of the interested parties. *Rodriguez v. Suárez*, 71 DPR 728 and therein questions of title cannot be resolved; *Sucn. Maldonado v. Maldonado*, 43 DPR 678.

In writs of possession, the question to be resolved is whether the plaintiff was in possession on a given date within the year prior to the filing of the complaint and whether he was deprived of such possession. *Martorell v. Municipio*, 70 DPR 380; *Rodríguez v. Suárez*, 71 DPR 728; 32 LPRA 3562.

The writ of possession has the purpose of maintaining the ownership of the person who has it and is disrupted from it, without being able to resolve questions of title. *Segarra v. Vilariño*, 92 DPR 314.

From the related facts it is clear that the plaintiff, within the year prior to the filing of the complaint had actual possession of the property that is described therein, as well as the fact that he was hindered and/or dispossessed of said possession or ownership.

In *Texaco, Inc. v. González*, 96 DPR 305, our Supreme Court stated: "The writ action is available to any owner." Castán says, in the work cited, on page 456:

> "In our Code the system is different. Since Article 446, as we have just seen (our Art. 375) grants protection for all owners and Art. 1.651 of Procedural Law (Art. 690 of our Civil Procedure Code) speaks of possession or ownership, it must be understood that writs are applicable both for one and for the other, and that they can be used by the possessor as a title of ownership, the simple occupant or actual owner, the usufructuary, the collateral holder, the obligee in a contract of antichresis, anyone using the right of retention, the lessee, the commodatary, the trustee and in a word, anyone who uses the technique of the Civil Code has possession, whether natural or civil, in the sense of owner or in a different sense."

The plaintiff, Alfonso Antonio Hernández Ortiz, has had possession since May 23, 1986, and his title has been recorded in the Property Registry since June 18 of that same year, having been presented on June 13, 1986. The complaint in the case is dated November 26, 1986. Before the filing of the case of record, the plaintiff was hindered from possession or ownership of his above-mentioned property, because the defendants, through an act of encroachment and without the

authorization of the plaintiff owner, illegally entered on the premises of the land mentioned with the intention of partially possessing it.

The defendants admitted not having *any* title to oppose the plaintiffs, nor express or tacit authorization from third parties to encroach upon it. They alleged a moral right and in a case in particular law at the hands of God.

The eviction action for unlawful detainer filed by the plaintiff is predicated on the fact that there has been no payment rate or compensation of any kind on behalf of the defendants to the plaintiff, due to the total absence of title on behalf of the defendants and due to the total absence of tacit or express permission on behalf of the plaintiff-owner or from any third party that may have been able to confuse this piece of land with another. This is nothing more or less than a *case of total "encroachment"*, that warrants the ejection of the encroaching defendants from the land that is the subject of the complaint.

The plaintiff, ALFONSO ANTONIO HERNANDEZ ORTIZ, properly justified his title to the defendants, along with the boundaries of his property, both with a copy of his duly recorded deed and photographs (documentary evidence) and with the testimony (oral evidence) of its administrator and real estate broker; and the other plaintiffs: ESTATE OF MARIO MERCADO RIERA properly justified its title to the defendants, along with the boundaries of his property, both through a Registry Certification that is in the record, duly certified maps and photographs (documentary evidence) and with the testimony (oral evidence) of its administrator and coowner, and HPY, INC. properly justified its title to the defendants, along with the boundaries of his property, both through a Registry Certification that is in the record, duly certified maps and photographs (documentary evidence) and with the testimony (oral evidence) of its architect and surveyor.

In cases like the present one, of illegal encroachment knowingly perpetrated on another's property, said encroachment does not create a right of privacy whatsoever for the encroachers nor does it protect its illegal possession. People who illegally and without any right whatsoever encroach on another's property, said encroachment does not create a right of privacy whatsoever for the encroachers nor does it protect their illegal encroachment. See *Amezquita v. Rafael Hernández Colón*, 518 F 2d. 8.

Anyone who builds in bad faith on any other person's land loses what has been built without any right to indemnity. When the defendant has precarious possession, as in the case of record the eviction is in order. See *A.T.P.R. v. Padír Santiago*, 104 DPR 426.

The eviction trial is one of a summary nature in which the only question is to try to recover possession of a piece of property for the person who has right to it *Negrón v. Corujo*, 67 DPR 398; *Escudero v. Mulero*, 63 DPR 574; *Palermo v. Tribunal*, 58 DPR 359; *Rivera v. Santiago*, 56 DPR 381; *González v. Colón*, 49 DPR 557; *Brunet v. Tribunal*, 45 DPR 901; and *CRUV v. Román*, 100 DPR

"In accordance with said doctrine if a defendant in eviction produces sufficient evidence that tends to show that he has some right to occupy the property and that he has title as good as or better that the plaintiff, a conflict of title arises which makes the eviction action improper." *This does not occur in the litigation of record. CRUV v. Román*, 100 DPR 318, 322.

JUDGMENT

Having heard the findings of fact and the conclusions of the precedent law the consolidated complaints of the case of record are hereby GRANTED, and it is ORDERED that all defendants CEASE AND DESIST from hindering the plaintiffs in the possession of the property that is the subject of the present litigation; and to vacate the premises of the

land that is the property of the plaintiffs, ESTATE OF MARIO MERCADO RIERA, HPY, INC. and ALFONSO ANTONIO HERNANDEZ ORTIZ, leaving them clear and available for the legitimate owners, plaintiffs, in these cases.

Costs, expenses and attorneys' fees incurred by the plaintiffs are severally imposed on the defendants. The corresponding Memorandum of Costs, Expenses and Attorneys' Fees incurred must be filed no later than ten (10) days from the filing of a copy of the notification of this Judgment by Edict in the case record.

Notification of this judgment shall be given by notifying the attorneys for the parties and by publishing an (1) Edict in a newspaper of general circulation; this Judgment shall not be final until thirty (30) days have passed from the publication of said Edict; and executable after forty (40) days have elapsed from when the Secretaries of the Department of Social Services and Housing have been notified through certified mail with return receipt requested, according to the provisions of Article 635 of the Civil Procedure Code, in force, (32 LPRA 2836).

The Clerk of this Court shall issue the Writ for ejection once what is provided in Article 636 of the Civil Procedure Code, in force (32 LPRA 2837), has been complied with.

Enter and Notify.

Issued in Ponce, Puerto Rico, June 4, 1991."

FELIPE ORTIZ ORTIZ (SIGNED)

SUPERIOR COURT JUDGE

Translator's note: A rubber stamp for the General Justice Court of the Commonwealth of Puerto Rico, Superior Court, appears on each page of the document.

APPENDIX B

COMMONWEALTH OF PUERTO RICO.
COURT OF FIRST INSTANCE
SUPERIOR COURT OF PONCE
SESSIONS ROOM 601

CIVIL NO. JPE-85-1459

RE: INJUNCTION—TRADITIONAL

COMMONWEALTH OF PUERTO RICO

Plaintiff

vs.

MARIO L. MERCADO ESTATE ET AL.

Defendant

STIPULATION ON THE DESIGNATION OF A SPECIAL COMMISSIONER

TO THE HONORABLE COURT:

COME NOW: (a) H.P.Y., Inc. through the undersigned attorney and (b) the Commonwealth of Puerto Rico, through its undersigned attorney, and very respectfully STATE, ALLEGE and PRAY:

1 Today, the undersigned attorneys met with the Special Commissioner, Atty. Domingo Raffucci, Bar Association number 1,480, and agreed to the following as to the designation of the Special Commissioner.

2. The draft "ORDER DESIGNATING THE SPECIAL COMMISSIONER" is hereto attached and forms part of this motion, as Exhibit "A."

In San Juan, Puerto Rico, today January 17, 1997.

[Signed]
DOMINGO RAFFUCCI
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EXHIBIT

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SUPERIOR COURT OF PONCE
SESSIONS ROOM 601

CIVIL NO. JPE-85-1459

RE: INJUNCTION TRADITIONAL

COMMOMWEALTH OF PUERTO RICO
PLAINTIFF

VS.

MARIO L. MERCADO ESTATE ET AL.,
DEFENDANT

ORDER DESIGNATING A SPECIAL COMMISSIONER

Based on the grounds set forth in the hearing of October 4, 1996 and now the submissions of the parties, the Court designates Atty. Domingo Raffucci as Special Commissioner in this case.

The Special Commissioner shall have and shall execute the powers and authority stipulated in Rule 41.3 of the Civil Procedures and in particular shall have and shall execute the powers to lead the procedures in all subsequent matters in the case, including the holding of as many meetings or hearings as necessary.

If any of the parties unjustifiably fails to appear at a hearing or meeting, the Commissioner may sanction said party by imposing upon him/her payment, costs and legal fees. The Special Commissioner may, if this behavior is repeated, recommend that the Court apply other sanctions.

The Special Commissioner shall receive testimony and documentary evidence the parties may deem fit to offer in order to settle the questions of fact pending in this case. He may cite any witness, including the parties and/or require that they produce any document, book, paper, voucher or writing he deems relevant and necessary in order to adjudicate this case. He shall decide on the admissibility of the evidence and shall grant it the credibility it deserves. He shall take the oath of witnesses and keep order at all times, being able to impose economic sanctions on the party that unduly interrupts the proceedings.

The parties may call witnesses before the Commissioner by issuing and notifying summons, as stipulated in Rule 40 of the Civil Procedures. Any witness who fails to appear or testify without an appropriate excuse, shall be punished for contempt and shall be subject to the consequences, penalties and remedies provided for in Rules 34 and 40 of the Civil Procedures.

Hearings before the Special Commissioner shall be held in a meeting room of the Judicial Center of San Juan by the consent of the Hon. Administrative Judge of said Judicial Center and when so stipulated by the parties, at the convenience of the parties, attorneys and witnesses. Upon said approval, the Special Commissioner, through the Hon. Coordinating Judge of Civil Affairs, shall provide the General Marshall of the Judicial Center of San Juan and the Director of the Services of Record of this Judicial Center with the information on the hearings or meetings in order to make available a meeting room, to provide for electronic recording and, if necessary, to reproduce all the incidents and testimonies of the hearings held.

The Special Commissioner may request the parties to submit memorandums on the issues he deems relevant.

Once the case is submitted by both parties, the Special Commissioner shall draft a written report in which he shall make findings of fact and recommendations on the conclusions of law, if necessary, submitting it to the Office of the Clerk of the Court within ninety (90) days from the date on which the case is finally submitted. He shall also fully comply with Rule 41.5 of the Civil Procedures.

The fees of the commissioner shall be paid at $250.00 an hour. The plaintiffs shall pay 50% of the fees and the co-defendants shall pay 50%. Said parties shall deposit the corresponding portion of the first hundred hours for the Commissioner's work in the Court within the next twenty (20) days. That is, each party shall deposit the amount of $12,500.00. If the matter delegated to the Special Commissioner ends in a settlement between the parties or another provision, without the Commissioner having invested said one hundred hours of work, the balance shall be awarded to the Commissioner as payment for fees. Should the matter require more hours of work the same terms and conditions [sic].

The following are the findings of fact pending before the Special Commissioner, as stipulated by the parties:

1. Appraisal of properties, pursuant to the legal system in effect as of _____ of _____.

2. Appraisal of the structures located on the property mentioned in the previous paragraph, subject to the final determination of the Court on the appropriateness of the compensation of same and, if appropriate, what the deadline by which the Government would be obligated to compensate for the structures built by the occupants and *malae fidei* possessors.

3. Appraisal of the existing infrastructure, in accordance with paragraph (2) above.

The Special Commissioner shall use as the basis the Judgment handed down by this Court on June 4, 1991, as well as the Resolutions and Orders issued on _____and _____, the Clerk of this Court shall send the Special Commissioner a copy of the aforementioned Judgment and Resolutions, as well as any other relevant document under his charge in holding hearings and preparing his report The legal file of the case shall remain under the custody of the Clerk of the Court and shall always be available to the Commissioner for examination. The Clerk shall send the Special Commissioner a copy of this order, a copy of the judgment of _____ _____, copy of Resolution _____ and a copy of order _____. The Special Commissioner may, of course, always take cognizance of the complete record of the case. Once the present order is notified, the Special Commissioner shall proceed to cite, through the Clerk or by telephone, the attorneys for a first meeting, which shall be held within forty (40) days following the notification of this order. At said meeting, they shall establish the final procedure to be followed and the order in which they are to dispose of the pending matters at issue. The Commissioner may hold prior hearings on those matters or defenses he deems appropriate in order to expedite the procedures and/or to settle the disputes he understands must be settled first.

Since the Court considered that the discovery of evidence was completed and given the full development of the case, the Special Commissioner may ask the attorneys for the parties to hold preliminary meetings among themselves and/or to submit detailed reports of their evidence, if necessary. Notwithstanding the above, if the Commissioner understands that, after holding one or more meetings, it is essential to allow the parties to make some additional limited discovery in order to expedite the proceedings, he may make a recommendation to the Court to this end.

Notify the parties and the designated Special Commissioner at their addresses:

In , Puerto Rico, on _____, _____.

_____

JUDGE OF THE SUPERIOR COURT
[Illegible initials appear in the left margin of each page]

APPENDIX C

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SUPERIOR COURT OF PONCE
SESSIONS ROOM 601

CIVIL NO. JPE-85-1459
RE: INJUNCTION

COMMONWEALTH OF PUERTO RICO
Plaintiff

VS.

MARIO L. MERCADO RIERA ESTATE ET AL.
Defendant

ORDER DESIGNATING A SPECIAL COMMISSIONER

Based on the grounds set forth in the hearing of October 4, 1996 and now the acceptance of the parties, the Court designates Atty. Domingo Raffucci as Special Commissioner in this case.

The Special Commissioner shall have and shall execute the powers and authority stipulated in Rule 41.3 of the Civil Procedures and he shall specifically have and execute the power to direct the proceedings in all incidents subsequent to the case, including the holding of as many meetings or hearings as necessary.

If any of the parties unjustifiably fails to appear at a hearing or meeting, the Commissioner may sanction said party by imposing upon him/her payment, expenses and legal fees. The Special Commissioner may, if this behavior is repeated, recommend that the Court apply other sanctions.

The Special Commissioner shall receive testimony and documentary evidence the parties may deem fit to offer in

order to settle the questions of fact pending in this case. He may cite any witness, including the parties and/or require that they produce any document, book, paper, voucher or writing he deems relevant and necessary in order to adjudicate this case. He shall decide as to the admissibility of the evidence and he shall grant it the credibility it deserves. He shall take the oath of witnesses and keep order at all times, being able to impose economic sanctions on the party that unduly interrupts the proceedings.

The parties may call witnesses before the Commissioner by issuing and notifying summons, as stipulated in Rule 40 of the Civil Procedures. Any witness who fails to appear or testify without an appropriate excuse, shall be punished for contempt and shall be subject to the consequences, penalties and remedies provided for in Rules 34 and 40 of the Civil Procedures.

Hearings before the Special Commissioner shall be held in a meeting room of the Judicial Center of San Juan by the consent of the Hon. Administrative Judge of said Judicial Center and when so stipulated by the parties, at the convenience of the parties, attorneys and witnesses. Upon said approval, the Special Commissioner, through the Hon. Coordinating Judge of Civil Affairs, shall provide the General Marshall of the Judicial Center of San Juan and the Director of the Services of Record of this Judicial Center with the information on the hearings or meetings in order to make available a meeting room, to provide for electronic recording and, if necessary, to reproduce all the incidents and testimonies of the hearings held.

The Special Commissioner may request the parties to submit memorandums on the issues he deems relevant.

Once the case is submitted by both parties, the Special Commissioner shall draft a written report in which he shall make findings of fact and recommendations on the

conclusions of law, if necessary, submitting it to the Office of the Clerk of the Court within ninety (90) days from the date on which the case is finally submitted. He shall also fully comply with Rule 41.5 of the Civil Procedures.

The fees of the commissioner shall be paid at $250.00 an hour. The plaintiffs shall pay 50% of the fees and the co-defendants shall pay 50%. Said parties shall deposit the corresponding portion of the first hundred hours for the Commissioner's work in the Court within the next twenty (20) days. That is, each party shall deposit the amount of $12,500.00. If the matter delegated to the Special Commissioner ends in a settlement between the parties or another provision, without the Commissioner having invested said one hundred hours of work, the balance shall be awarded to the Commissioner as payment for fees. Should the matter require more hours of work the same terms and conditions [shall apply].

The following are the controversies of fact pending before the Special Commissioner, as stipulated by the parties:

1. Appraisal of properties, pursuant to the legal system in effect as of May 15, 1996.

2. Appraisal of the structures located on the property mentioned in the previous paragraph, subject to the final determination of the Court on the appropriateness of the compensation of same and, if appropriate, the deadline by which the Government would be obligated to compensate for the structures built by the occupants and *malae fidei* possessors.

3. Appraisal of the existing infrastructure, in accordance with paragraph (2) above.

The Special Commissioner shall use as the basis the Judgment handed down by this Court on June 4, 1991, as well as the abstract of the Judgment prepared by the General Clerk

on April 10, 1992, and the Order of June 27, 1996. All pertinent minutes from the proceedings from April 17, 1996 to present, as reflected in the record, shall also be considered. The legal file of the case shall remain under the custody of the Clerk of the Court and shall always be available to the Commissioner for examination. The Clerk of this Court shall send the Special Commissioner a copy of this order, a copy of the judgment of June 4, 1991, a copy of the abstract of April 10, 1992, a copy of the order of June 27, 1996, and copies of all the minutes taken from April 17, 1996 to present and hereinafter until ordered otherwise. The Clerk shall also send the Special Commissioner, at his request, a copy of any other document pertinent to his mandate. The Special Commissioner may, of course, always take cognizance of the complete record of the case. In due time, upon the final conclusion of his duties, the Special Commissioner shall submit to the Court all records made during the discharge of his mandate, which shall be included in the records of the case at bar.

Once the present order is notified, the Special Commissioner shall proceed to cite, through the Clerk or by telephone, the attorneys for a first meeting, which shall be held forty (40) days after the notification of this order. At said meeting, they shall establish the final procedure to be followed and the order in which they are to dispose of the litigious matters at issue. The Commissioner may hold prior hearings on those matters or defenses he deems appropriate in order to expedite the procedures and/or to settle the disputes he understands must be settled first.

Since the Court considered that the discovery of evidence was completed and given the full development of the case, the Special Commissioner may ask the attorneys of the parties to hold preliminary meetings among themselves and/or to submit detailed reports of their evidence, if necessary. Notwithstanding the above, if the Commissioner

understands that, after holding one or more meetings, it is essential to allow the parties to make any additional limited discovery in order to expedite the proceedings, he may make a recommendation to the Court to this end.

The Court is not bound to accept as presented any report or reports that may be submitted by the Special Commissioner. Such reports may be adopted, amended or rejected. Nonetheless, it should be noted that any determinations, conclusions and recommendations the Special Commission may make shall be given full consideration by this Court, which shall not alter same unless it is shown that there is prejudice, partiality or manifest error.

A copy of this order shall be notified to the Hon. Administrative Judge and to the Hon. Coordinating Judge of Civil Affairs, both from the Judicial Center of San Juan and to the Hon. Administrative Judge of the Judicial Center of Ponce for their respective cognizance.

NOTIFY

In Ponce, Puerto Rico, on January 22, 1997.

[Signed]
HERMAN LUGO DEL TORO
JUDGE OF THE SUPERIOR COURT

J PE45-1459

Atty. Rafael Elvira, F-7 Fagot Ave., Ponce, PR 00731

Atty. Juan A. Santiago Bahamunidi, Box 831, Ponce, PR 00733

Atty. Juan B. Soto, Antonio J. Colón Alsina, Adrián Mercado, c/o. Atty. Juan J. Ramírez, Box 720, Mayagüez, PR 00681

Atty. Francisco J. Amundaray, PO Box 4839, San Juan, PR 00902

Atty. Yusif Mafuz Blanco, Dept. of Justice, Box 9020192, San Juan, PR 00902

Atty. José R. Méndez Purcell, Box 1109, Ponce PR 00733-1109

Atty. Domingo Raffucci, Box 363464, San Juan, PR 00936-3464

Hon. Administrator Judge, Carlos Rivera Martínez, PO Box 190887, San Juan, PR 00919-0887

Hon. Coordinating Judge of Civil Affairs, Pedro López Oliver, PO Box 190887, San Juan, PR 00919-0887

Hon. Administrator Judge Elba R. Rodríguez Fuentes, Judicial Center of Ponce, P.O. Box 1791, Ponce, PR 00733

You are hereby notified of the present Order.

In Ponce, Puerto Rico, February 7, 1997.

CARMEN ANA TORRES TORRES
General Clerk
By: [Illegible signature]
Deputy Clerk

mse
22197

APPENDIX D

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SUPERIOR COURT OF PONCE
JUDICIAL CENTER OF PONCE

CIVIL NO. J PE85-1459
RE:
INJUNCTION

COMMONWEALTH OF PUERTO RICO
Plaintiff

v

MARIO MERCADO ESTATE ET AL
Defendants

Resolution Approving Report of the
Special Commissioner
On the Value of the Property of H.P.Y., Inc.

By mandate of the Court, on July 11, 1997, the Special Commissioner, Domingo Raffucci, submitted a report dated July 10, 1997, on the market value of the 90.003 *cuerda* plot of land, property of H.P.Y., Inc. In Informative Motion of July 17, 1997, the Commissioner corrected a typing error on page 7, line 10 of the report so that where it says $29,000.00 it should read $2,900.00. The Special Commissioner concluded that the H.P.Y., Inc. property appraised as a vacant lot, excluding structures and infrastructure, had as of May 15, 1996 a market value of $37,982.16 per *cuerda*, for a total of $3,418,508.80; that is, the approximate equivalent of $9.50 a square meter as unit value. The Court proceeded to accept said determination, incorporating the above-captioned case as a legal determination.

The Commonwealth of Puerto Rico filed objections to said report in writings submitted on July 31, 1997 and August 5, 1997. On August 29, 1997, H.P.Y. submitted a well-founded motion in reply to the arguments set forth by the Commonwealth of Puerto Rico, a legal hearing being held on September 18, 1997 to discuss, *inter alia*, this matter, and upon instructions of the Court, the Special Commissioner submitted to the record a complementary report, dated October 14, 1997. Subsequently, the Commonwealth of Puerto Rico submitted another motion on October 23, 1997.

As part of its duties and charges, Atty. Raffucci, with his vast experience and expertise as retired judge of the superior court, studied numerous and voluminous documentary evidence. In addition, he held evidentiary hearings, listened to the parties and granted them the opportunity to present evidence, allegations and necessary arguments, including expert evidence.

This Court has studied the Commissioner's reports, the objections and arguments of the Commonwealth of Puerto Rico and other evidence on record. We have found that there is no valid or sufficient reason of fact or law that justifies modifying or dismissing the conclusions and recommendations of the Commissioner. In absence of passion, prejudice, partiality or manifest error, there are no grounds for which we should alter or reject the report of the Special Commissioner.

In view of the above, this Court gives its approval to the Report of the Special Commissioner on the market value of the 90.003 cuerda plot property of H.P.Y., Inc., dated July 10, 1997, as corrected, adding the comments and analysis of the complementary report of October 14, 1997, incorporating the same reports, by reference, into the present resolution of the Court.

In San Juan, for Ponce, Puerto Rico, August 5, 1998.

[Illegible signature]
Herman Lugo del Toro
Judge of the Superior Court

APPENDIX E

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SUPERIOR COURT OF PONCE
JUDICIAL CENTER OF PONCE

CIVIL NO. J PE85-1459

RE: INJUNCTION

COMMONWEALTH OF PUERTO RICO
Plaintiff

vs

MARIO MERCADO ESTATE ET AL
Defendants

Resolution on the Accession of Improvements and Structures

This is a case of invasion and illegal occupation of private property belonging to the Mario Mercado Riera Estate and the H.P.Y. Partnership, Inc. The case began its legal life in the year 1985. It has followed a path of multiple procedural events due to the complexity of the disputes, the size of the occupied lands and the legal consequences of the development of the Punta Diamante Community, made up of more than one thousand (1,000) low-income families. The Court understands that said community is made up of Puerto Ricans, many of whom are young; good, honorable and hard-working people, with bona fide intentions and purposes to reside and live there because they need housing and because they want to exercise their legitimate rights to life, liberty and the enjoyment of property and the pursuit of happiness.

In 1988, the Commonwealth of Puerto Rico began a process to expropriate part of the property of the Mercado Estate. Subsequently, this Court determined that a significant part of the lands belonging to the Mercado Estate, as well as all of the H.P.Y., Inc. property were not expropriated in spite of it being totally illegally occupied. See "Resolution Ratifying Approval of Final Plan," issued on August 7, 1998.

The Judgment on the possessory injunction, precarious eviction and accession, handed down on June 4, 1991 by the Hon. Felipe Ortiz Ortiz, Judge of the Superior Court. Said Judgment was notified to all parties, including the Commonwealth [of Puerto Rico]. It was determined, *inter alia*, that the defendants never acted in good faith in the illegal possession of the property invaded; that the construction on the property was made in bad faith; and that whoever builds in bad faith on property belonging to others loses what has been built, without the right to compensation. Said judgment is final and binding.

The order to execute the Judgment was issued on April 10, 1992, but it did not proceed to the eviction due to the confusion and imprecision of the properties, which were the object of expropriation by the Commonwealth [of Puerto Rico]. The marshals of the Court did not know exactly which were the private properties that had been invaded due to errors and confusion in the boundaries of the expropriated property.

In view of this situation, Judge Felipe Ortiz Ortiz named surveyor Julio C. Ríos as a court expert, received an expert report, held hearings and finally, decided to paralyze the execution of the above-captioned Judgment until the case of the forced expropriation was resolved. The Resolution to this effect was issued on October 16, 1992.

In Case No. KEF88-0418 on the forced expropriation, it was determined that the expropriated property did not include

the H.P.Y. property. As reflected in the minutes of October 30, 1990 in the above case of expropriation, it was decided that Exhibit "A" of the expropriation should be amended in order to clear up all doubts. Nevertheless, the expropriation plan (Exhibit "A") was never amended and on December 8, 1995, Judgment was handed down in Case No. KEF88-0418 on the forced expropriation, Superior Court of San Juan.

Thus, H.P.Y. and the Mercado Estate requested that the squatters be evicted and that they be ejected from their properties in case at bar. The Commonwealth of Puerto Rico intervened in order to oppose the remedy, invoking the expropriation plan that was never amended, thus assuming an unlawful position and causing procedural confusion.

This Court scheduled and held a meeting on April 17, 1996, initiating a long 24-day series of hearings to evaluate the options available to the Court (including ejection), to clear up the confusion caused by the errors of the Commonwealth of Puerto Rico in expropriating, and seeking sensible, reasonable and viable solutions for all parties. The Court did all of this bearing in mind the socioeconomic situation that existed and exists in the Punta Diamante Community.

In this context, the Court outlined the facts and pinpointed the demarcations and boundaries of the properties belonging to the Commonwealth of Puerto Rico, E.P.Y. and the Mercado Estate. During these legal hearings and meetings in chamber, the Court reviewed and analyzed several plans and documents with technical experts and attorneys for the parties and with the Court expert. The Court also made a private and informal visual inspection of the land, without the parties, with a plan in hand, accompanied by the General Marshal of Ponce and the Courtroom Marshall. No minutes were taken of this informal visual inspection.

As a result of this intensive analysis process, the Court reached several conclusions on the configuration and

boundaries of the private properties and the properties occupied by the Punta Diamante Community and expropriated by the Commonwealth of Puerto Rico. These conclusions are included in the minutes of the legal hearings, reflected in the records of the Court and, in particular, in the Resolution Ratifying the Final Plan issued on August 7, 1998.

During the proceedings of this Court, it was determined that it was not appropriate to order the execution of the Judgment handed down on June 4, 1991 in the case at bar. On May 14, 1996, in open session before this Court, the Commonwealth of Puerto Rico, through its legal representatives, formalized an institutional commitment and a contractual promise to acquire the properties of H.P.Y., Inc. and the Mercado Estate occupied by the Punta Diamante Community. The offer of the Commonwealth of Puerto Rico was accepted by H.P.Y., Inc. and by the Mercado Estate.

The Government of Puerto Rico promised the Court on that day to acquire, either by purchase or by expropriation, all the additional properties and the remaining land of the property that had already been expropriated and was illegally occupied by the Punta Diamante Community. See the Minutes of May 3 and 14, 1996.

We cannot lose sight of the fact that the underlying situation was the request to execute the Judgment by ejecting and evicting an already established community made up of hundreds of families illegally occupying private property. Different types of construction, including houses made of wood, cement and [cinder] blocks, streets, sidewalks, electric lines, etc. had been built. The improvements and structures had been built in bad faith by both the occupants, or "squatters," and the Commonwealth of Puerto Rico, on private property, the subject of the Judgment handed down by this Court.

It is within this context, of which the Government had cognizance, that it agreed to acquire the private properties, with all the consequences of accession, compensation and appraisal derived from the Judgment and the law. The suggested alternative was to execute the eviction from some properties highly populated by the Punta Diamante Community, with different types of structures and improvements, and different social and family characteristics. The alternative to evict also involved some problems: logistics, cost and a very significant socioeconomic impact. The Government knew about all of this. All parties found that the alternative to accept the institutional commitment and the contractual promise of the Commonwealth of Puerto Rico to acquire the private property affected by the illegal occupation, and by the final and binding Judgment, as we have pointed out before.

It has been established that the date of May 14, 1996 is instrumental for the purposes of the Commonwealth of Puerto Rico's acquisition of the properties, pending the appraisal and compensation, with the acceptance and stipulation of the Commonwealth of Puerto Rico and the owners of the private properties.

The Court determined that the properties that the Commonwealth of Puerto Rico has to acquire included:

(a) a lot consisting of five segregated plots, with a total area of 90.0003 *cuerdas*. belonging to the H.P.Y., Partnership, Inc., identified as "Finca H.P.Y." (H.P.Y. Property) on the final plan adopted by the Court,

(b) a lot with an area of 17.401 *cuerdas*, belonging to the Mercado Estate, identified as "Lote X Y" (Lot X Y) on the final plan in the case at bar. See "Resolution Ratifying Approval of Final Plan" of August 7, 1998.

On January 30, 1997, the Commonwealth of Puerto Rico submitted a writing entitled "Allegation," by which it intended to qualify and reduce the extent of the commitment of the Government. The Commonwealth of Puerto Rico maintains that its commitment applies only to acquiring the properties occupied by the Punta Diamante Community which had not been expropriated, paying a just compensation. In this sense, the Commonwealth of Puerto Rico maintains the it does not have to pay compensation for: 1) the houses built by the occupants, 2) the infrastructure built by the Government, 3) the legal costs incurred by the plaintiffs in these proceedings. On February 19, 1997, H.P.Y. filed a reply to the allegation of the Commonwealth of Puerto Rico. The Mercado Estate also filed a motion on March 14, 1997 in opposition to the allegation of the Commonwealth of Puerto Rico. Let us see.

It has clearly been established that "the Government has an obligation to pay a just compensation when it seizes a property by the direct exercise of its power of eminent domain, initiating a remedy of expropriation or through its regulations, or when there is a physical invasion of same." *Hampton Development Corp. Vs. E.L.A.*, Judgment of January 18, 1996, 96 J.T.S. 4, page 559; *E.L.A.* vs *Rexco Industries*, Op. of December 6, 1994, 94 J.T.S. 151; Art. 282 of the Civil Code, 31 L.P.R.A. Sec. 1113; Constitution of Puerto Rico, Article II, Section 9.

The Government must abstain from seizing or prejudicing private property without the due process of law. In interpreting the provisions of the law on the purchase, occupation or forced expropriation and the compensation that must be paid by the Government, it is necessary to bear in mind the mandates of justice and due process of law promulgated in sections 7 and 9 of Article II of the Constitution of Puerto Rico.

The concept of private property has changed with history. Property has been given a social function, which is to serve society. *Rivera Vs. R. Cobián Chinea & Co.*, 69 D.P.R. 672, 676 (194)[sic]. In the case *The Richards Group Vs. Junta de Planificación*, 108 D.P.R. 23, 34-39 (1978) the Supreme Court stated:

> The concept "property" is not static. It represents an idea that historically has been distinguished for its extraordinary democratic societies involves specific rights, but that these rights exist in continual competition with other public and private interests, the importance of which changes and at time, increases. The extent of these rights and the degree to which they must give way to other values depend on the circumstances of each dispute.
>
> **********
>
> Such an abundant harvest of theories has generated, as could be expected, considerable controversy. There are, at one extreme, the flag bearers for the old ownership rights, who demand compensation in all cases...At the other extreme, there is an abundance of enthusiasts of maximum expansion of the government's reasoning power. For some authors, a regulation reasonably related to the exercise of a valid public function cannot, under any imaginable circumstances, constitute seizure.
>
> We believe that the state of chaos of this legal sector is due, in good part, to that desire, which at times affects all of us, to find simple and uniform rules for highly complex and variable situations. There are fields of law in which simplicity is reached only at the cost of justice; in which the decision-making process is, by necessity, painful and complicated.
>
> We feel that that is the case of the present situation. We find ourselves in another situation in which the values involved have to be separated, case by case. It is necessary to

> openly identify these values and the situations on which they are based, to precisely establish their hierarchy, situation by situation, in order to strike a reasonable balance for the times in which we live, between the government actions that demand compensation under circumstances such as those in the case at bar, and those that do not demand compensation.

In the case at bar, we are facing a *sui generis* post-judgment situation with very unique characteristics, which has transcended the mere execution of a judgment. This Court has become involved in the difficult search for that fine and elusive "reasonable balance for the time in which we live, in which the decision-making process is, by necessity, painful and complicated." In this process we have tried to strike a balance between the acts and omissions of the government that demand compensation, the interests of certain property owners who have been deprived of their property, and the needs of the residents of the Punta Diamante Community.

We must remember that the Government has to act in accordance with the law and the general principle of good faith. The Government is not exempt from this. Although property is invested with a social interest or function, it is also true that the right to property has not been abrogated in Puerto Rico. "If an individual takes possession of a property that belongs to another, having full enjoyment of same with the exclusion of its true owner, the former's obligation to pay for said use and enjoyment is perfectly clear. The same principle applies to corporations and political entities...*De la Cruz Vs. Gobierno de la Capital*, 68 D.P.R. 534, 547 (1948).

The Government has had knowledge of and participation in this case directly and indirectly from the beginning. By intervening in the post-judgment proceedings held to evaluate alternatives to the execution of the judgment handed down against the Punta Diamante Community, the Commonwealth of Puerto Rico had to confront its own acts and omissions. It had to face a final and binding judgment with the effect of a

possessory injunction. As a result of all of this, and to also avoid the serious consequences of the then potential eviction and ejection of most of the approximately twelve hundred (1,200) families that make up the Punta Diamante Community, the Commonwealth of Puerto Rico decided to acquire the private property occupied said community. With the commitment formalized by the Commonwealth of Puerto Rico and accepted by the owners of the occupied lands, the Court decreed, *and in this action ratifies, that there would be no eviction or ejection which was causing so much uncertainty and concern for the neighbors of Punta Diamante*. Instead, the legal proceedings to be followed have been to explain and formalize the acquisition and transfer of the lands to the Commonwealth of Puerto Rico, and to determine the just compensation for same. This was the formula supported by the Court in order to achieve a just, reasonable and final solution to this dispute.

As part of its theory to sustain the exclusion of the improvements on the properties acquired to appraise same, the Commonwealth of Puerto Rico quotes section 2915 of Title 32 of L.P.R.A. In its pertinent parts, said section states that in the case of a purchase or forced expropriation of private property, "compensation shall not include any increase whatsoever because of public improvements or investments made by the Commonwealth of Puerto Rico in the place through any of its executing departments, agencies or instrumentalities." The Court understands that this provision of law, which comes from the so-called "after-effect" theory, as interpreted in *Pueblo vs Sucn. Junghanns*, 73 D.P.R. 648 (1952), cannot be applied to the circumstances of the present case. To the contrary, we would be ignoring the requirements of good faith and due process of law by the Commonwealth of Puerto Rico and allowing it to go against it own acts and omissions. It is not as simple as excluding or not excluding such benefits or increases in the appraisal.

In the circumstances of this case, the Government acquired certain litigious properties. From the beginning, the Commonwealth of Puerto Rico knew that the invaded properties were private property. The Commonwealth of Puerto Rico knew of the litigation. It was notified of the judgment handed down. The Government knew or should have known that any improvements or construction made on the private property subject to the judgment was in bad faith for legal purposes. Article 293 of the Civil code states that "possession in good faith ceases from the time that the possessor knows on his/her own the defects of the title." Moreover, the good faith of the possessor ends when a claim is filed by the owner to claim his/her property. In both hypothetical cases, the Government is accused of bad faith in the circumstances of this case. As stated in the judgment of June 4, 1991 and handed down in the case at bar, whosoever builds in bad faith on someone else's land loses what has been built without the right to compensation. *A.T.P.R. vs. Padín Santiago*, 104 DPR 426, 428 (1975). This is the case whether it be a person, a legal entity or a government entity. *De la Cruz vs. Gobierno de la Capital, supra.*

The legal concept of accession involves three fundamental principles. The principle of good faith is very subjective and objective. On one hand, it has been said that good faith means subjective honesty of a person, originating usually from the erroneous belief that his/her conduct does not go against the legal system. On the other hand, good faith alludes to a whole set of objective rules of honesty in legal traffic or trade. Díez Picazo points out that good faith has been called a "legal standard," a model of social conduct, or rather, " a conduct that is sociably considered as good, or also, social conduct demanded by the conscience of a community in a legal situation, in accordance with the ethical imperatives that exist within the community. This conclusion is important because in order for good faith to exist, a simple error or a mere belief is not sufficient. It is necessary that the person who has suffered the bad faith must have performed that conduct which the social conscience claims. Specifically, that

the person has worked diligently and, hence, his/her error is excusable." *Fundamentos de Derecho Civil Patrimonial*, Volume III, page 251, Editorial Civitas, Madrid, 1995.

The second principle that supports the right of accession is the one expressed with the aphorism, "*accessorium sequitur [naturum sui] principalis." An accessory follows the [nature of his] principal.* This principle implies a relationship of principal and the accessory between two things, wherein one holds a preeminent position and the other a subordinate position. This means that accessory things follow the legal system, luck and the fate of the principals.

The third principle of accession is derived from or an application of the second principle. This is he maxim*"superficies solo cedit."* This means that the relationship between what is on the ground and anything located in it or above it –construction, plantings, etc.-, the ground is always the principal thing. Everything on the ground –the surface of the land –must follow the same legal system as the ground and forms, together with the ground, one single block or unit. Thus, the Civil Code stipulates that whatever construction made on the ground belongs to the owner of the ground. Díez Picazo, *ob. cit page 253.*

In an analysis of its social function as relevant to this case, the principle of *"superficies solo cedit"* facilitates the permanence of whatever has been incorporated in an inseparable way to the other's ground, avoiding demolition of same. This makes it possible to meet human needs, as in the case of individual or family housing, through the permanent and definitive building or construction on the ground. *Ibidem*, page 255.

The law states that the ownership of real property includes the right to accession to all that is united or joined to it, whether in a natural way, as is the case of alluvium, or in an artificial way, as happens with building or construction.

Article 287 of the Civil Code, 37 LPRA sec. 1131. Whatever is built on someone else's property, and the improvements or repairs made to these, belongs to the owner of same. Thus provides Article 294 of the Civil Code, 31 LPRA sec. 1161. The owner of the property on which the building takes place has a right to make the works his own. The bona fide constructor or builder has the right to be compensated by the owner of the property. Article 287 of the Civil Code, 31 L.P.R.A. sec. 1164. Nevertheless, whoever builds in bad faith on another's land, loses what has been built, without the right to compensation. Article 298 of the Civil Code, 31 L.P.R.A. sec. 1165; . *A.T.P.R. vs. Padín Santiago, supra, Cedó vs. Laboy*, 79 D.P.R. 788 (1956); *Lippitt vs. Llanos*, 47 D.P.R. 269 (1934).

The good faith or bad faith of the builder on another's land is a decisive element in resolving the dispute. In the case at bar we can attribute good faith to the Commonwealth of Puerto Rico because it knew from the beginning, before and after the judgment was handed down, the identity of the owners of the properties and of their efforts to avoid the occupation and illegal construction on their properties. Díez Picazo explains that the good faith of the owner of the property consists of his diligence in eliminating the error of the builder. Therefore, we can conclude that H.P.Y. and the Mercado Estate have acted within the framework of legal good faith. Nevertheless, the Commonwealth of Puerto Rico cannot oppose an error of good faith as to the title of the expropriated property because the mere allegation of a belief is not sufficient. Its contradictory actions in relation to what to include and what to exclude in the expropriation; the information it received to alert the Commonwealth of Puerto Rico of its errors and contradictions in both the case of forced expropriation and in the case at bar; its reckless or intransigent conduct in certain historic stages of the legal proceedings; all of this keeps the Commonwealth of Puerto Rico from claiming good faith with regard to the construction

or improvements made on the land belonging to H.P.Y. and the Mercado Estate. The Commonwealth of Puerto Rico and any other private parties who built on the land on the belonging to H.P.Y. and the Mercado Estate are *malae fidei* builders. As such, they do not have any right whatsoever to what they build on another's land, nor to the cost or disbursement they have made. "The act is objectively considered to be illicit and the bad faith presumes awareness of the illicit nature of the act. There is no reason whatsoever to compensate or reimburse. Even when his action implies enrichment for the land owner, the builder is sanctioned by virtue of his bad faith." Díez Picazo, *ob. cit.*, page 272. See also, Lacruz Berdejo, *Elementos de Derecho Civil*, Tome III, 1st Vol., pages 168-169. Third edition, J.M. Bosch, Editor, Barcelona, Revised reprint, 1991.

By acquiring the private property occupied by the Punta Diamante Community, the Commonwealth of Puerto Rico, in the exercise of its social function, has been able to avoid the execution of the judgment through the ejection of the residents, the eviction of the Punta Diamante Community the demolition of what was illegally constructed there. The owners of the properties had decided to accept the government's acquisition of the properties. This implies, on the one hand, that the owners have consolidated the acquisition of the buildings on their properties, making them theirs by virtue of the right of accession. On the other hand, the Government has acquired those properties with all their uses, improvements, buildings and belongings inherent in same, and it has taken on the responsibility of paying a just compensation for all of this.

By virtue of the above, the Commonwealth of Puerto Rico's objections to compensating for the houses, improvements, structures, buildings and construction on the properties it has acquired, formulated in its "Argument"

submitted to the record on January 30, 1998, are hereby DISMISSED.

The parties are ordered to proceed with the presentation of the necessary evidence to the Special Commissioner, Domingo Raffucci, in order to identify the improvements, structures or construction which are subject to the accession. They shall also proceed to submit evidence related to the value of same, for purposes of compensation. The Special Commissioner and the parties shall proceed in accordance with this Resolution and in accordance with the "Order Designating the Special Commissioner," issued last January 22, 1997. The Special Commissioner shall submit to the Court, in due time, a report with his findings of law, which shall enjoy the respect of the Court and which shall not be altered unless shown that there has been prejudice, partiality or manifest error. In evaluating what constitutes a work subject to the law of accession, it is necessary to bear in mind that the rules of this legal concept apply to any permanent incorporation of assets to the ground that represents construction. The law assumes that the works have been permanently incorporated into the ground; that they are an integral part of it, property by incorporation, and not simply because of its purpose. By the name of building, construction or work, the Civil Code refers to all activity by virtue of which a new facility is incorporated into the ground in a fixed and permanent manner. This can be what is commonly known as a building, as the factory construction for housing or analogous uses, with solid and durable materials, but which can also be any facility, although its final purpose is not for housing. The important thing is that it is incorporated into the ground and is part of it. These are constructions of all types, attached to the ground (such as, for example, a bridge, a highway, a house, a swimming pool, etc.). Not to be included are facilities that are not definitely and permanently incorporated into the ground so that they can easily bee removed without damage to the property. See Díez Picazo,

ob. cit. , pages 261-262; Lacruz Berdejo, *ob cit.*, section 14, page 159. The distinguished Spanish jurist Lacruz Berdejo mentions in a treatise a judgment of April 18, 1980 that "the posts for the subsequent installation of electricity" cannot be considered to be "constructions nor plantings, nor as being adhered permanently to the ground, in such a way they cannot be withdrawn without damage.

Lastly, the problem of costs, expenses and attorney fees calls for different treatment in the circumstances of this case. The owners, H.P.Y. and the Mercado Estate, have stated that the Commonwealth of Puerto Rico is responsible for same. The Judgment of June 4, 1991 imposes *on the defendants* jointly and severally, the costs, expenses and legal fees incurred by the plaintiffs. A memorandum of costs was submitted and approved. Certainly the Commonwealth of Puerto Rico had cognizance of and participated directly and indirectly in all the stages of this case, from the beginning. Nonetheless, it could be stated that technically, the Commonwealth of Puerto Rico was not exactly a party at the time the sentence was handed down, in spite of the fact that it was notified of same and that it requested an amendment ***nunc pro tunc*** to the judgment. It has been decided in Puerto Rico that it is not appropriate to charge attorney fees to the Commonwealth of Puerto Rico, its agencies or instrumentalities. In the current state of law, it is very difficult to definitely sustain that the Commonwealth of Puerto Rico does not enjoy certain procedural privileges. Moreover, it is difficult to ignore the concerns of what the fiscal impact on public funds a legal decision may have . Let us not lose sight of the fact that we have determined that any work constructed by the Commonwealth of Puerto Rico up to May 14, 1996, according to the above criteria, would be in bad faith for the purposes of the right of accession. We also have in mind the fact that, during certain stages of these proceedings, the Commonwealth of Puerto Rico has incurred in conduct that can be categorized as reckless, obtuse and intransigent. The

plaintiffs have been subject to the ordeal of a long legal process and they have been exposed to expenses and the need to hire professional and expert services, with a sometimes exorbitant burden on their finances.

The Court understands that in the particular circumstances of this case we must exercise our judicial discretion in order to temper these items claimed by the plaintiffs. We resolve to deny the claim of the plaintiffs to make the Commonwealth of Puerto Rico pay for all the costs, expenses and attorney fees. The Court shall only grant those essential expenses actually incurred by H.P.Y. and the Mercado Estate for expert appraisal and surveying during the post-judgment proceedings. As to the expenses of the Special Commissioner, the parties shall follow the order of January 22, 1997, designating the Special Commissioner.

NOTIFY.

In San Juan, for Ponce, Puerto Rico, August 14, 1998.

[Illegible signature]

HERMAN LUGO DEL TORO
JUDGE OF THE SUPERIOR COURT

APPENDIX F

COMMONWEALTH OF PUERTO RICO
IN THE CIRCUIT COURT OF APPEALS
REGIONAL CIRCUIT V OF PONCE
AND AIBONITO SUBSTITUTE PANEL II EXHIBIT 3

KLCE9801051

Superior Court of Ponce
JPE-85-1459
Certiorari from the Court of First Instance,

COMMONWEALTH OF PUERTO RICO, THE REGULATIONS AND PERMITS ADMINISTRATION, REPRESENTED BY ITS ADMINISTRATOR, ENGINEER LIONEL MOTTA GARCÍA

Appellant

v.

ESTATE OF MARIO L. MERCADO RIERA AND CHILDREN, REPRESENTED BY HIS ATTORNEY-IN-FACT EILEEN MARÍA COFFEY MERCADO; H.P.Y, INC., CORPORATION, ROSA RODRÍGUEZ, MIGUEL ANGEL RODRÍGUEZ TORRES, MIGUEL TORRES DÍAZ, RAMÓN MATOS PÉREZ, HÉCTOR L. DE JESÚS LATORRE, LUZ TORRES, COLON, RAMON APONTE TORRES WILLIAM SANTIAGO

Appellees

JUDGMENT

In San Juan, Puerto Rico, August 27, 1999.

I.

The Commonwealth of Puerto Rico appeals, through the Attorney General, the two resolutions issued on August 5 and 14, 1998 by the Court of First Instance, Superior Court of Ponce, in the above-captioned proceedings on the provisional injunction submitted to said forum by the Commonwealth of Puerto Rico against the H.P.Y., Inc. Corporation ("H.P.Y."), the Estate of Mario L. Mercado Riera and other parties. The proceedings are related to several properties belonging to the appellees, located in the Punta Diamante Sector of Ponce.

The properties in question were invaded by third parties who have been occupying said properties since then. The Commonwealth of Puerto Rico, which expropriated part of the property, is now interested in expropriating the remaining property in order to keep the occupants from being thrown out and to grant them title to the plots they occupy.

In the Resolution of August 5, 1998, the Court approved an appraisal report submitted by the designated Special Commissioner in the case related to several plots of the property belonging to "H.P.Y., with an aggregate surface of 90.003 *cuerdas*.

In its Resolution of August 14, 1998, the Court determined that, by expropriating the property, the Commonwealth of Puerto Rico had to pay the owners for the value of the buildings and improvements made by the squatters and by certain State agencies on the property which is the subject of the above-captioned dispute, since the construction was made in bad faith.

Not satisfied with both determinations, the Commonwealth of Puerto Rico has appealed to us. In the Resolution issued on October 22, 1998, we granted the appellees a period of time

to appear and show cause for which we should not issue the writ requested and to revoke the second of the resolutions appealed (August 14, 1998). The appellees have appeared in writing.

Let us proceed as requested. We revoke the Resolution of August 14, 1998 related to the accession and compensation for the improvements and structures in dispute. As to the Resolution of August 5, 1998, concerning the report of the Special Commissioner, although we sustain same on its merits, we understand that the Commissioner's report must possibly be amended in light of our analysis of the dispute on the improvements and structures and, therefore, we return the matter to the Court of First Instance for the appropriate action.

II.

FACTS

1. The properties of the Appellees.

As reflected in the record, the appellee H.P.Y. is Corporation organized under the laws of Delaware and authorized to do business in Puerto Rico.

At the time of the present litigation, H.P.Y. was the owner of a 90.003 *cuerda* property located in the Punta Diamante Sector of the Canas Ward of Ponce, and made up of five plots. The description of the properties is as follows:

> (A)—RURAL: Plot of land located in the Canas Ward of the municipality of Ponce, Puerto Rico, with a surface area of twenty-six point six thousand seven hundred twenty *cuerdas*, equivalent to one hundred four thousand eight hundred forty point three thousand eight hundred eighty-three square meters (104,840.3883). It borders on the North with part of the principal property in two directions, from which the ninety *cuerdas* were segregated of which the present part is a remainder,

property of the Trusteeship of the Mario Mercado and Sons Partnership, at a distance in the first direction of nine hundred fifty-six point fifteen meters, and the second direction at a distance of two hundred seventy-three point four hundred ninety-six meters; on the South and in just one direction and at a distance of one thousand one hundred eighty-eight point six hundred seventy meters with the plot identified with the letter "E" on the plan prepared by Engineer Rafael Dosal Lines; on the East, in just one direction and at a distance of three point five hundred seventy-four meters, with the Punto Oro Development; and on the West, in just one direction and at a distance of one hundred two point eighty-five meters, with the land of the principal property, known as *Hacienda Matilde*, property of the Trusteeship of the Mario Mercado and Sons Partnership, and from which the plot of fifty *cuerdas* was segregated and of which this is the remainder. This plot is identified as "A" on the segregation plan prepared by Engineer Rafael Dosal Lines.

(B)—RURAL:Plot of land located in the Canas Ward of the municipality of Ponce, Puerto Rico, with an area of eleven point six thousand six hundred sixty-six *cuerdas*, equal to forty-five thousand eight hundred fifty-four point four thousand forty-six square meters (45,854.4046), bordering on the North with a plot identified with the letter (A) on the segregation plan prepared by Engineer Rafael Dosal Lines, that is, with more land of the ninety *cuerda* plot, from which this plot is segregated, this border being a single alignment of one thousand one hundred fifty-five point three hundred fifty (1,155.350) meters: on the South in a single alignment of one thousand one hundred thirty nine point three hundred eighty-seven meters, bordering with the segregated land of the ninety *cuerda* plot identified as Plot "B" on the plan prepared by the aforementioned

Engineer Rafael Dosal Lines; on the East, in a single alignment of forty point fifteen meters, bordering with the Punto Oro Development; and on the West, in a single alignment of forty-one point five hundred four meters, bordering with more land of the principal property known as *Hacienda Matilde*, property of the Mario Mercado and Sons Partnership

(C)—RURAL: Plot of land located in the Canas Ward of the municipality of Ponce, Puerto Rico, with a surface area of one hundred eleven thousand three hundred forty-seven square meters, with fifty-five centimeters of another (111,347.55), equivalent to twenty-eight *cuerdas* with three thousand three hundred thirty-three thousandth of another (28.3333), bordering on the North with the remaining sixty-one point six thousand six hundred sixty-seven *cuerdas* of the ninety original *cuerdas*, at a distance of one thousand one hundred thirty-nine point five hundred eighty-seven meters (1,139.587) and a direction of seventy-eight degrees forty-six minutes and fifty-four seconds Northeast. On the South, with property belonging to the Punto Oro Development, at a distance of one thousand ninety-five point six hundred eighteen meters (1,095.618) and a direction of seventy-eight degrees fifty-seven minutes and fifty-three seconds Southwest. On the East with property of the Punto Oro Development, at a distance of sixty-five point nine hundred thirty-eight meters (65.938), with a direction of four degrees, two minutes and three seconds Southeast, and at a distance of thirty-seven point zero seventy-two meters (37.072), with a direction of three degrees forty-one minutes and forty-seven seconds Southwest. On the West, with land belonging to the principal property known as *Hacienda Matilde*, property of the Mario Mercado and Sons Partnership, from which the ninety *cuerda* plot was segregated, of which the plot described herein is

segregated at a distance of one hundred one point one hundred eighty-five meters (101.185), with a direction of twenty-six degrees, three minutes and seven seconds Northwest.

(D)—RURAL: Plot of land located in the Canas Ward of the municipality of Ponce, Puerto Rico, with a surface area of forty-five thousand eight hundred forty-nine point three thousand five hundred thirty-nine (45,849.3539) square meters, equivalent to eleven point six hundred sixty-six (11,666) *cuerdas*. It borders on the North in a single direction and at a distance of one thousand one hundred seventy point nine hundred-seventeen meters, with the plot marked "A" on the segregation plan prepared by Engineer Rafael Dosal Lines; on the South in a single direction and at a distance of one thousand one hundred fifty-five point three hundred fifty meters with the plot marked "C" on the aforementioned plan that was segregated from the ninety *cuerda* property, from which this plot is segregated; on the East in a single direction with land belonging to the Punto Oro Development, at a distance of thirty-nine point four hundred eighty-four meters; and on the West, in a single direction and at a distance of forty-one point zero sixty-five meters with the land of the *Hacienda Matilde*, property of the Mario Mercado and Sons Partnership, from which the ninety *cuerdas* were segregated, from which this plot is segregated.

(E)—RURAL: Plot of land located in the Canas Ward of the municipality of Ponce, Puerto Rico, with a surface area of eleven point six hundred sixty-six (11.666) *cuerdas*, equivalent to forty-five thousand eight hundred forty-nine point three thousand five hundred thirty-nine meters. It borders on the North, in a single direction and at a distance of one thousand one hundred eighty-eight point six hundred seventy meters, with the plot marked

"A" on the segregation plan prepared by Engineer Rafael Dosal Lines; on the South in a single direction and at a distance of one thousand one hundred seventy point nine hundred seventeen meters, with the plot marked "D" on the aforementioned segregation plan and which was segregated from the ninety *cuerda* property, from which the plot described herein was segregated; on the East, in a single direction, with the land belonging to the Punto Oro Development, at a distance of thirty-eight point nine hundred ninety-three meters; and on the West, in a single direction and at a distance of forty point two hundred forty-three meters, with land belonging to the *Hacienda Matilde*, property of the Trusteeship of the Mario Mercado and Sons Partnership, from which the ninety *cuerdas* were segregated, from which this plot is segregated.

The Mario L. Mercado Riera Estate[1] was the freeholder of a property known as the *Finca Matilde,* located in the Canas Ward of Ponce adjoining the property of H.P.Y., composed of three plots. The description of these properties is as follows:

—Plot MT-FOUR, RURAL: Plot of land located in the Canas Ward of the municipality of Ponce, Puerto Rico, with a surface area of SEVEN HUNDRED FIFTY-FIVE *CUERDAS* FIFTY-EIGHT HUNDREDTHS, equivalent to two hundred fifty-seven hectares, sixty-six areas, ninety-one centiares and six hundred thirty-two milliareas, composed of the following portions:

—Portion A: Rural: located in the Canas Ward of the municipality of Ponce, with a surface area of two

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[1] Said Estate, as reflected in the record, consisted of Eufemia Eileen, known as Eileen, and Adriana Mercado Parra, Eileen María and David Mario Coffrey Mercado, and María Luisa, Margarita María, and Richard Wilson Mercado.

hundred forty-six *cuerdas* seventy-three hundredth, equivalent to ninety-six hectares, ninety-seven areas, forty-seven centiareas and five hundred ninety-two milliares, bordering on the North with the State Highway number two, in ten alignments that total fifty-eight point ninety-nine meters; on the East with the land belonging to the Puerto Rico Aqueduct and Sewer Authority: Regional Office, in four alignments that total one hundred seventy-two point seventy-one meters, with the portion MT-Three-Flat, in an alignment of seven hundred twenty point forty-one meters; on the South with the Caribbean Sea in thirty-five alignments that total two thousand forty-seven point seventy-three meters and on the West with the Las Salinas Lagoon in seven alignments that total one thousand ninety-eight point sixty-seven meters. This portion is identified on the segregation plan as plots MT-Four-Flat-A- of one hundred eighty-five *cuerdas* ninety-eight hundredths and MT-Four-Flat-B, sixty *cuerdas* seventy-five hundredths.

—Portion B; Rural: located in the Canas Ward of the municipality of Ponce, with a surface area of thirty-seven *cuerdas* seventy-three hundredths, equivalent to fourteen hectares, eighty-two areas, ninety-three centiares and nine hundred ninety-two milliares, bordering on the North with the portion MT-Three-Industrial of the Plot MT-Three in an alignment of two hundred seventy-one point twenty-four meters; on the East with the land belonging to the Social Programs of Puerto Rico, in eighteen alignments that total five hundred fifty-seven point ninety-seven meters; on the South with State Highway number two, in two alignments that total two hundred sixty-six point seventy-six meters and on the West, with the portion MT-Three-Steep Slope of the plot MT-Three, in an alignment of four hundred eighty point twelve meters.

This portion is identified on the segregation plan as parcel MT-Four Industrial.

—Portion C: Rural: located in the Canas Ward of the municipality of Ponce, Puerto Rico, with a surface area of three hundred seventy-one *cuerdas* twelve hundredths, equivalent to one hundred forty-five hectares, eighty-six areas, fifty centiares and zero forty-eight milliares, bordering on the North with property belonging to the Ferré Enterprises in ten alignments that total nine hundred fifty-eight point ten meters; with land belonging to Nicolás Pagán, in five alignments that total two hundred ninety-seven point twenty-seven meters; with property belonging to the Ferré Enterprises in twenty-seven alignments that total seven hundred point fifty-nine meters and with the property of Dr. Humberto Zayas Chardón, in five alignments that total two hundred eighty-three point forty-one meters; on the East with the property of the Punto Oro Development, in four alignments that total one thousand four hundred forty-seven point nine meters; on the South with property belonging to Ponce West Industrial Area and the property of the Social Programs, in thirteen alignments that total four hundred eighty-nine point ten meters and with the property of the Puerto Rico Lands Authority, in fourteen alignments that total two thousand twenty-three point thirty-four meters; and on the West with the Portion MT-Three Steep Slope of Plot MT-Three, in one alignment of one thousand two hundred five point seventy-five meters. This portion is identified on the segregation plan as MT-Four-Steep Slope.

Likewise, Mr. Alfonso Hernández Ortiz was the owner of a plot of 30.16 *cuerdas*, located in the Canas Ward of Ponce. The property was described as follows:

—RURAL: Plot of land located in the Canas Ward of the municipality of Ponce, Puerto Rico, with an original surface

area of one hundred fifty-three thousand nine hundred twenty-three point six thousand two hundred thirty-six (153,923.6236) square meters, equivalent to thirty-nine point one thousand six hundred twenty-one (39.1621) *cuerdas*, which after segregating thirty-five thousand three hundred seventy-six point one thousand seven hundred (35,376.1700) square meters, equivalent to nine point zero zero zero seven (9.0007) *cuerdas* that made up property number twenty-seven thousand one hundred eighty-eight (27,188) left a remnant of one hundred eighteen thousand five hundred forty-six point four thousand five hundred thirty-six (118,546.4536), equivalent to thirty point one thousand six hundred fourteen (30.1614) *cuerdas* bordering on the North with street number one (1) to be built in Punto Oro Development and at a distance of one hundred fifty-four thousand two hundred forty-eight (154,248) linear meters; on the South and in different alignments at a distance of five hundred fifty point six hundred thirty-seven (550.637) linear meters with State highway number two (2) ("Ponce By Pass"); on the East at a distance of eight hundred sixty-nine point two hundred fifty-seven (869.257) linear meters with street number one (1) of Punto Oro Development and on the West on several alignments and at a distance of six hundred forty-four point three hundred forty-one (644.341) linear meters with the El Tuque Industrial Park.

2. The Invasion of the Lands and the Cases of Eviction.

On or about 1985, the aforementioned properties were illegally invaded and occupied by people of low-economic resources. The squatters proceeded to divide the occupied properties into plots and to build houses and other structures.

To keep the invasion from spreading, on July 15, 1985, the Commonwealth of Puerto Rico filed the present request for provisional injunction and preliminary and permanent injunction against several of the squatters and against H.P.Y.

and the Mercado Riera Estate,[2] requesting the Court to paralyze construction on the properties. The Commonwealth of Puerto Rico stated that, among other allegations, said construction had been done illegally, with the approval or tolerance of the owners (H.P.Y. and the Mercado Riera Estate), Case No. CS85-1459.

At the time the case was submitted, approximately seven hundred forty-seven (747) plots had been divided into lots and more or less one hundred fifty (150) structures had been raised H.P.Y. and the Mercado Riera Estate filed complaints against co-party against the squatters, alleging that the squatters had entered their property illegally and requesting the Court to evict them from the property and to order them to remove the structures they had built. The Court was also asked to process the complaint as a class action, a request that was granted by the Court in a resolution of September 20, 1985.

On October 31, 1986, the Commonwealth of Puerto Rico asked to drop its original petition. In its motion, the Commonwealth of Puerto Rico alleged that the division into lots, as well as the construction of the structures on the invaded property had multiplied since the filing of the complaint and therefore "the problem ceased to be exclusively a legal problem and had become a socioeconomic problem, requiring that measures be taken by several agencies of the Commonwealth of Puerto Rico, a problem that was much broader and complex than the one intended to be covered in this lawsuit." The motion added that:

> Given the critical housing problem that exists in the area of Ponce, and especially the problems said community has faced over the past few months, the Government, through its agencies decided, to reevaluate

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[2] As far as this Court can determine, Mr. Hernández Ortiz was not included in the claim of the Commonwealth of Puerto Rico.

its position in order to administratively solve not only the problem of the division into lots and the clandestine construction, to which this legal action was aimed, but also to relocate, in an orderly manner, the number of families who have established themselves in the Punta Diamante Sector.

As reflected in the record, the motion of the Commonwealth of Puerto Rico responded to the fact that at this date, the government authorities had decided to expropriate part of the invaded property in order to divide same among the squatters and other people who need housing. Nevertheless, H.P. Y. opposed the request.

On November 26, 1986, while the Commonwealth of Puerto Rico's request for dismissal of action was pending, Mr. Hernández Ortiz filed a complaint for eviction and accession against several of the squatters who had taken possession of his properties, requesting the eviction of same, Case No. CS86-2817. The complaint was subsequently consolidated with Case No. CS85-1459, filed by the Commonwealth of Puerto Rico.

In due time, and in view of H.P.Y.'s opposition to the Commonwealth of Puerto Rico's request for dismissal of action, the Court ordered the corresponding agencies to confirm their intention vis-à-vis the property in dispute and to inform the government of the measures taken. The Government did not comply with this order. In view of the above, the Court denied the request for dismissal of action in the resolution of March 20, 1987.

3. Expropriation of the Properties

On April 23, 1987, the Mercado Estate filed a counterclaim against the Commonwealth of Puerto Rico in Case CS85-1459, alleging that the invasion of the property had been tolerated by the authorities, which, acting maliciously and negligently, had refused to proceed against the squatters. The

Estate stated that, as a question of fact, the occupation of the properties had intensified because of statements made by the Department of Housing, which had led the squatters to believe that the Government would acquire the properties. The Mercado Riera Estate alleged that the actions of the Commonwealth of Puerto Rico had effectively deprived it of its property and therefore requested that its property be expropriated. It also requested that it be compensated for the damages caused by the behavior of the Commonwealth of Puerto Rico.

On June 4, 1987, the Court issued a Resolution in Case CS86-2817, stipulating that any aggregation or additional construction made on the properties involved in this dispute after said date would be understood to have been done in bad faith.

Thus, on October 10, 1988, the Commonwealth of Puerto Rico filed a complaint to expropriate an area of 199.0843 *cuerdas* in the Canas Ward of the Municipality of Ponce; Case No. 88-0418. The description of the property to be expropriated was as follows:

> RURAL: Plot of land located in the Canas Ward of the municipality of Ponce, with a surface area of 199.0843 *cuerdas*, equivalent to 782,480.8770 square meters, according to the survey of the Rural Housing Administration, bordering: on the North with Ferre Enterprises and Dr. Humberto Zayas Chardón; on the South with the Las Batatas creek; on the East with the Punto Oro Development; and on the West, with the principal property.

As reflected in the record, the purpose of the expropriation was to grant property titles to hundreds of illegal occupants by developing a housing project in the Punta Diamante area, to be carried out by the Rural Housing Department of the

Housing Administration.[3] Together with its request, the Government allocated an amount of $194,400.00 as compensation for the property.

On November 3, 1988, the Expropriations Division issued a Resolution allowing the request and granting the Rural Housing Administration title of the property in question.

As reflected in the record, as of that moment, several agencies and instrumentalities of the Government developed infrastructure works on the invaded properties, including properties belonging to H.P.Y., understanding that same had been expropriated. The Rural Housing Administration, the Aqueduct and Sewers Authority, the Electric Power Authority and the Municipality of Ponce built and installed different facilities aimed at meeting the needs of the occupants of the properties. Streets, sewers and facilities to provide electric services were constructed.

4. Confusion on the Boundaries

The expropriation request filed by the Commonwealth of Puerto Rico had stated that the owner and sole party interested in the expropriation was the Mercado Riera Estate. The Government alleged that the H.P.Y. properties were not included in the expropriation. Nonetheless, the survey plan included with the request, prepared by Engineer Ismael Cordero, indicated that the expropriated property bordered on the East with the Punto Oro Development, which implied that a substantial portion of the H.P.Y. properties had been included.

At first sight, H.P.Y. seems to have accepted the argument of the Commonwealth of Puerto Rico that it had not expropriated land from its properties. In accordance with the request for dismissal with prejudice submitted by H.P.Y. in

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[3] Currently, the Administration of Development and Housing Improvements.

Case No. CS85-1459, on May 1, 1990, the Ponce Court deposited among the records of the court the claims filed by said party.[4] Six days later, on May 7, 1990, the Court issued a Partial Judgment dismissing, on its merits, the claim for damages filed by the Mercado Riera Estate against the Commonwealth of Puerto Rico.

In its Judgment, the Court of Firs Instance concluded that the Government could not be found responsible for its failure to act against the squatters or for its decision to drop its claim for injunction filed in Case No. CS85-1459, because all the parties had acted under the belief that the property occupied by the squatters had been included in the land expropriated in Case No. KEF88-0418:

> The fact that the Government has not insisted on its original claim does not mean that the former has been negligent in filing or processing its claim. The surprising thing about the allegation of the Estate is that it admits that the decision to desist occurs when all, including the Estate itself, believes that that property is part of what has already been expropriated.

The case continued as to the requests for eviction submitted by the owners of the properties against the squatters. It is not clear whether the Commonwealth of Puerto Rico had a direct role at this stage, although it apparently continued to be notified of the proceedings.

On September 14, 1990, H.P.Y. requested that its claim be reopened after the Mercado had turned in a new survey that showed the existence of a dispute concerning the boundary points with the property expropriated by the Government. The survey showed that, contrary to the statements of the

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[4] The Expropriations Division had refused to take responsibility for the cases pending before the Ponce Court, through the Resolution issued on May 20, 1989, understanding that the disputes were separable.

Commonwealth of Puerto Rico to H.P.Y., it had expropriated the property.

H.P.Y. also requested to intervene in the expropriation lawsuit. This request was denied on October 30, 1990 since the Commonwealth of Puerto Rico insisted that it had not expropriated properties. The Commonwealth of Puerto Rico opposed the intervention, denying the allegations made by H.P.Y. Subsequently, the Court denied the intervention.

The Commonwealth of Puerto Rico's statements that it had not expropriated H.P.Y. properties were contrary to the expropriation plan and, therefore, the Expropriations Division ordered that same be corrected, in accordance with the Government's position. Said correction was never made. Nor were the cases consolidated and, hence, the eviction lawsuits continued to be processed separately from the expropriation lawsuit.

5. The Eviction Judgment and procedures to execute same.

On June 4, 1991, the Court handed down Judgment in the consolidated Cases CS85-1459 and CS86-2817, allowing the requests for eviction filed by H.P.Y., the Mercado Estate and Mr. Hernández Ortiz.

In its judgment, the Court concluded that the properties had been subject to illegal invasion and that the squatters did not have title to the properties. It determined that the occupants were builders in bad faith since they did not have any right whatsoever to continue in possession of their homes. The Court ordered the eviction of the squatters from the property.

The judgment did not mention the expropriation lawsuit nor did it try to distinguish between the squatters who were on the land acquired by the Commonwealth of Puerto Rico and those who remained on the properties of H.P.Y. and the Mercado Riera Estate and Mr. Hernández.

The judgment was notified to all the parties, including the Commonwealth of Puerto Rico. On June 28, 1991, the Government filed a request to amend *nunc pro tunc* the judgment handed down, requesting that it be made clear that the judgment did not have any affect whatsoever on the persons who occupied the expropriated property in Case No. KEF88-0418.

On April 10, 1992, the Court issued an order to execute the judgment, which excluded the expropriated land from the scope of the order to be executed. Notwithstanding the above, due to the confusion concerning the boundaries of the expropriated property, the General Marshall found it necessary to request the Court to appoint a surveyor to determine the limits of the area to be evicted. The Commonwealth of Puerto Rico appeared before the Court to keep the occupants from being evicted, alleging that they were on lands expropriated by the Government.

The Court of First Instance proceeded to designate surveyor Julio C. Ríos to make a new survey of the properties and to clear up the situation.

On July 28, 1992, Surveyor Ríos submitted a report to the Court, in which he concluded that on the expropriation plan prepared by the Commonwealth of Puerto Rico, lands belonging to H.P.Y. had mistakenly been included.

Based on the aforementioned expert report, the Commonwealth of Puerto Rico filed a motion to intervene in the above-captioned cause of action in order to impede the eviction of the occupants until the dispute on the boundaries of the properties in question had been cleared up.

On October 16, 1992, the Court ordered that the execution of the judgment be paralyzed until the Expropriations Division finally decided the lawsuit on the forced

expropriation.[5] The Court of First Instance understood that the Expropriations Division was in a better position to determine the boundaries of the properties in dispute.

On December 8, 1995, the Expropriations Division finally handed down a Judgment in Case No. KEF-88-0418, ordering the Commonwealth of Puerto Rico to pay the Mercado Riera Estate $663,791.08 more, in addition to the $194,400.00 allocated as compensation for the expropriation. In its order, which was based on the stipulations of the parties, the Court reaffirmed its previous decision that H.P.Y. properties had not been expropriated. Said decision, as stated, was contrary to the plan of the expropriated property and to the reality of the occupation. H.P.Y., however, was not allowed to intervene in the proceedings and, therefore, they could not notify the Court on this situation.

Thus, H.P.Y. insisted that the Judgment issued in the cases CS85-1459 and CS86-2817 be executed and that the squatters be evicted from the occupied portion of its property, which the Commonwealth of Puerto Rico insisted had not been expropriated. The Commonwealth of Puerto Rico, contrary to what it had alleged before the Expropriations Court, now stated that the H.P.Y. invaded properties were included in the expropriation plan prepared by surveyor Cordero. At this time, the Mercado Riera Estate alleged that there were seventeen (17) *cuerdas* of its property that had not been expropriated in Case No. KEF88-0418, in spite of the fact that they too had been invaded, and therefore requested that the occupants be evicted, pursuant to the Judgment of September 4, 1991.

Notwithstanding the demands of H.P.Y. and of the Mercado Riera Estate that the eviction judgment be executed

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[5] That day, Mr. Hernández Ortiz reached an agreement with the squatters that apparently settled the dispute in Case No. CS86-2817. As of that time, the cases were no longer consolidated.

against the squatters who were occupying property that had not been included in the expropriation, the Court of First Instance refused to put said order into effect. Instead, after February 1996, the distinguished Court of Instance held numerous hearings to discuss the situation, citing the corresponding agencies which had been requested to a study on the impact of the projected eviction.[6]

In the discussion held during this period, several things clearly emerged: (1) that H.P.Y. had not been received any compensation whatsoever for its land that had been invaded and included in the expropriation plan, due to certain errors on the boundaries of the property as laid out by the surveyor for the Commonwealth of Puerto Rico, (2) that the expropriation had also omitted a sector of the property belonging to the Mercado Riera Estate, which had been invaded and developed by the Development and Urban Housing Development and Improvement Administration, which had substituted the Rural Housing Administration, and (3) that the occupants of the invaded property not included in the expropriation were subject to the eviction judgment issued by the Court in the consolidated cases CS85-1459 and CS86-2817 on June 4, 1991.

6. The Expropriation of other invaded lands

As a result of the steps taken by the Court, on May 14, 1996, the Administration of Development and Urban Housing Improvements agreed to compensate the owners of the invaded properties who had not received said compensation in Case No. KEF88-418[sic], expanding the expropriation to include all the land of the Punta Diamante Sector.

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[6] As reflected in the record, from April 17, 1996 to February 21, 1997, the Court held twenty-one (21) hearings to discuss the problem, an extraordinary and praiseworthy effort which undoubtedly contributed to the resolution of the situation.

To this end, on June 14, 1996, the Legislative Assembly approved Joint Resolution Number 245 allocating to the Administration the amount of $2,941,000.00 to purchase and make physical improvements on the properties located beyond the 199.0843 *cuerdas* that had already been expropriated by the Commonwealth of Puerto Rico.

The Government's decision made compliance with the eviction judgment handed down by the Court on June 4, 1991 purely academic. Still pending, however, was the identification of the properties involved and the establishment of compensation for the owners.

On June 27, 1997, the Commonwealth of Puerto Rico allocated the amount of $2,000,000.00, to be divided in equal parts between the Mercado Estate and H.P.Y, in order to partially compensate them for the properties that the Government had agreed to acquire. As reflected in the record, this included the 90.003 *cuerda* plot belonging to H.P.Y. and another 17,401 *cuerda* plot belonging to the Mercado Estate.

On October 4, 1996, the parties agreed to request that a Special Commissioner be appointed to set a just value on the new lands to be acquired by the Government. Subsequently, the parties suggested that Atty. Domingo Raffucci be appointed the Special Commissioner.

On January 22, 1997, the Court issued an order designating Atty. Raffucci as Special Commissioner and charged him with solving the following disputes:

a) Appraisal of the lands, pursuant to the legal system in effect on the 15th of May 1996.

b) Appraisal of the structures located on the lands mentioned in the above paragraph, subject to the final decision of the Court on the appropriateness of the compensation for same and, if appropriate, the deadline

by which the Government would be obligated to compensate for the structures built by the occupants and *malae fidei* possessors.

c) Appraisal of the existing infrastructure, in accordance with the above paragraph.

At this stage, a controversy arose concerning the scope of the compensation the Government had to pay to the owners of the property. H.P.Y. and the Mercado Estate claimed that the Commonwealth of Puerto Rico had to pay them for the structures and improvements built on their properties, as well as for the expenses and legal fees incurred by said parties in the different procedures. In its writings, H.P.Y. appraised said construction at ten million dollars ($10,000,000.00), that is, five (5) times more than the two (2) million ($2,000,000.00) allocated by the Commonwealth of Puerto Rico to pay for the properties.

The Commonwealth of Puerto Rico opposed this claim, alleging that it was only obligated to pay the market value of the land and not the structures and improvements. The parties submitted memorandums in support of their respective positions.

On July 10, 1997, while this dispute was pending, the Special Commissioner issued a voluminous report on the market value of the 90.003 *cuerda* plot belonging to H.P.Y., excluding the improvements and structures. The Commissioner determined that the market value of said property was $3,418,508.80, equivalent to a value of $9.50 per meter.

In order to reach this conclusion, the Commissioner compared the H.P.Y. plot with other properties sold in the area and which were similar to the H.P.Y. property in surface area, time, topography and soils, location, access, views and better use. In particular, he used comparable sales of five other properties located in the area which, in his judgment,

were pertinent for arriving at the market value of the properties in question.

The Commonwealth of Puerto Rico submitted certain objections to the report, which were answered by H.P.Y. and incorporated into a complementary report submitted by the Commissioner on October 14, 1997.

7. Appealed resolutions.

After other incidents, on August 5, 1998, the Court issued the first of the resolutions appealed in this appeal, approving the appraisal report of the Special Commissioner.

In its Resolution, the Court noted that the Commissioner, who was a person with vast experience in the matter, having conducted a study on numerous documentary evidence, as well as holding evidentiary hearings in which he had had the opportunity to listen to witnesses and [found] that there was no basis whatsoever to substitute their conclusion.

Two days later, on August 7, 1998, the Court issued a Resolution approving the final plan of the properties involved in the dispute.

In its Resolution, the Court noted that:

> The Commonwealth of Puerto Rico's failure to amend the [expropriation plan] to bring it into line with the reality of the properties and to the intention and purpose that is reflected in the records of ...Case No. KEF88-0418, prolonged the cloud of confusion over the location and boundaries of the properties illegally occupied and which belonged to H.P.Y. and the Mercado Estate; the execution of the judgment had been requested in the above-captioned case.
>
> The plan that we adopted finally clears up confusion...."

The Court also determined that the description of the property expropriated by the Commonwealth of Puerto Rico was as follows:

> RURAL: Plot of land located in the Canas Ward of the municipality of Ponce, with a surface area of one hundred ninety-nine (199) *cuerdas* with eight hundred forty-three (843) ten thousandths of a *cuerda* (199.0843) according to the plan prepared by the surveyor Hernán Lugo Rodríguez, dated last September 1996, and authenticated by Professor Julio César Ríos, that is, the "PROPERTY A' borders on the: NORTH with the property of (i) Mr. Nicolás Pagán, (ii) Ferré Enterprises, Inc. and (iii) Dr. Humberto Zayas Chardón (today the Autonomous Municipality of Ponce); SOUTH, with the Las Batatas creek and property belonging to the Commonwealth of Puerto Rico of the CANAS RURAL COMMUNITY AND LAS BATATAS RURAL COMMUNITY;———EAST, with the properties of: (i) HPY, Inc. and (ii) Mario Mercado Riera Estate, in a remnant of the principal property from which was segregated and designated and named "LOT-XY" by surveyor Hernán Lugo Rodríguez in his plan dated last September nineteen hundred ninety-six (1996 WEST: properties of: (i) Mario Mercado Riera Estate, in a remnant of the principal property, from which was segregated, and designated and named "REMNANT-1" by surveyor Hernán Lugo Rodríguez in his plan dated last September nineteen hundred ninety-six (1996), (ii) Commonwealth of Puerto Rico of the CANAS RURAL COMMUNITY AND LAS BATATAS RURAL COMMUNITY); (iii) Puerto Rico Lands Administration

On the other hand, the Court determined that the property belonging to the Mercado Riera Estate affected by the illegal occupation of persons and that was still pending expropriation was the following:

RURAL: Plot of land located in the Canas Ward of the municipality of Ponce, Puerto Rico with a surface area of sixty-eight thousand three hundred ninety-four point one hundred eighty-seven (68,394,187) square meters, equivalent to seventeen point four hundred (17.400) *cuerdas*, bordering on the: NORTH with the properties of HPY, Inc.; ————————————————— —SOUTH with the property of the Commonwealth of Puerto Rico in the "CANAS RURAL COMMUNITY;" ———-EAST with properties of Alfonso Hernández Ortiz; and WEST, with properties of the Commonwealth of Puerto Rico in the "PUNTA DIAMANTE RURAL COMMUNITY," expropriated in Case Number: KEF 88-0418 and designated by surveyor Hernán Lugo Rodríguez in his plan dated February 1996, as the expropriated property, that is, "LOT A."————-

A few days later, on August 14, 1998, the Court issued the second appealed resolution, concerning the improvements and structures built on the properties that had not been expropriated. The Court concluded that the owners of said properties had the right to build their structures and improvements by accession, and, therefore, the Government had to pay a just compensation for all this, before acquiring said properties.

In its resolution, the distinguished appealed court noted that the Punta Diamante Community, created from the invasion of lands by the appellees, "is made up of Puerto Ricans, many of whom are young; good, honorable and hard-working people, with bona fide intentions and purposes to reside and live there because they need housing and because they want to exercise their legitimate rights to life, liberty and the enjoyment of property and the pursuit of happiness."

The Court recognized that the squatters had been defeated in the lawsuit on eviction, "but the eviction was not carried out due to the confusion and imprecision concerning the

properties expropriated by the Commonwealth of Puerto Rico." The Court noted that in the forced expropriation lawsuit, it had been determined that the expropriated property did not include the H.P.Y. property, thus ordering the plan be corrected, but that the Commonwealth of Puerto Rico had then intervened in the eviction case, invoking the expropriation plan that had never been amended, "assuming ... an unlawful position and causing procedural confusion."

The Court pointed out that the final date for setting the compensation was May 14, 1996, the date on which the Government agreed to acquire the properties that had not been expropriated:

> That day the Government of Puerto Rico agreed before this Court to acquire, either by purchase or expropriation, all the additional properties and remaining properties of the property already expropriated and that were illegally occupied by the Punta Diamante Community.....
>
> We cannot lose sight of the fact that the underlying situation was the request to execute the Judgment by evicting and ejecting an already established community, made up of hundreds of families, illegally occupying private property. They had already raised and incorporated on these lands different types of construction, including wooden, cement and [cinder] block houses, streets, sidewalks, electric lines, etc. The improvements and structures had been built in bad faith by both the occupants, or "squatters," and the Commonwealth of Puerto Rico, on private property, the subject of the Judgment handed down by this Court.
>
> It is within this context that the Government knew that it agreed to acquire the private properties, with all the consequences of accession, compensation and appraisal derived from the Judgment and the law.

The Court determined that the Government had acted, at all times, with knowledge of the situation of the properties:

> From the beginning, the Government has had cognizance of and participated in this case directly and indirectly. By intervening in the post-judgment proceedings held to evaluate alternatives to executing the judgment handed down against the Punta Diamante Community, the Commonwealth of Puerto Rico had to confront its own acts and omissions. It had to face a final judgment with the effects of a possessory injunction. As a result of all of this, and in order to avoid the serious consequences of what was, at that time, a potential eviction and ejection of a large part of the approximately twelve hundred families who made up the Punta Diamante Community, the Commonwealth of Puerto Rico decided to acquire the private property occupied by said community. With the commitment formalized by the Commonwealth of Puerto Rico and accepted by the owners of the occupied lands, the Court decreed, and in this action ratifies, that there would be no eviction or ejection which was causing so much uncertainty and concern for the neighbors of Punta Diamante. Instead, the legal proceedings to be followed have been to explain and formalize the acquisition and transfer of the lands to the Commonwealth of Puerto Rico, and to determine the just compensation for same...

The Court determined that the Commonwealth of Puerto Rico could not allege that an error had been made in good faith with regard to the title of the expropriated properties, because:

> the mere allegation of a belief is not sufficient. Its contradictory acts with regard to what is included and excluded in the expropriation, the information it received to alert the Commonwealth of Puerto Rico of its errors and contradictions in the case of the forced

> expropriation, as well as in the above-captioned case; its reckless or intransigent conduct in certain historical stages of the legal proceedings; all this prevents the Commonwealth of Puerto Rico from claiming good faith as to the construction or improvements made on the properties belonging to H.P.Y. and the Mercado Estate. The Commonwealth of Puerto Rico and any other individual builders on the properties belonging to H.P.Y. and the Mercado Estate are *malae fidei* builders. As such, they have no rights whatsoever with regard to what they may have built on another's property, or with regard to the cost or disbursement that they may have made.

Further on, the Court also added:

> By acquiring the private property occupied by the Punta Diamante Community, the Commonwealth of Puerto Rico, in the exercise of its social function, has been able to avoid the execution of the judgment by evicting the residents, the ejection of the Punta Diamante Community, and the demolition of what had been built there illegally. The owners of the properties have opted to accept the government acquisition of their lands. This implies, on one hand, that the owners have consolidated the acquisition of the structures on their properties acquiring them by virtue of the right of accession. On the other hand, the Commonwealth of Puerto Rico has acquired these lands with all its uses, improvements, buildings, and belongings inherent to same and has taken on the obligation of paying a just compensation for everything.

The Court denied the objections of the Government to compensate the appellee for the houses, improvements, structures, buildings and construction on the acquired property.

However, the Court denied the request of the appellees to impose on the Government all the expenses and fees incurred by H.P.Y. and the Mercado Riera Estate during the proceedings. The Court indicated that it understood that "during certain stages of these proceedings, the Commonwealth of Puerto Rico had incurred in conduct that could be described as reckless, obtuse and intransigent." Nevertheless, it concluded that the claim of the appellees was not inadmissible and that it was only appropriate to impose on the Government the payment of the essential expenses incurred by the H.P.Y. and the Mercado Riera Estate for the expert service of appraisal and the survey during the post-judgment proceedings, as well as the corresponding portion of the Special Commissioner's fees.

In due time, the Commonwealth of Puerto Rico requested that the resolutions issued by the Court on August 5 and 14, 1998 be reconsidered. The record does not show that these motions were accepted by the Court.

Not satisfied, the Commonwealth of Puerto Rico then resorted to this forum.

III.

In its appeal, the Commonwealth of Puerto Rico states that the Court erred by determining that it was appropriate to compensate the owners of the properties for structures built by the squatters and for the infrastructure prepared by Commonwealth of Puerto Rico agencies and by approving the appraisal report prepared by the Special Commissioner on the H.P.Y. property.

1. Payment of Construction and Improvements

Section 9 of Article II of the Constitution of the Commonwealth of Puerto Rico, in its pertinent part, stipulates that "Private property shall not be taken or damaged for public use

except upon payment of just compensation and in the manner provided by the law." See also, 31 L.P.R.A. sec. 1113.

The Supreme Court of Puerto Rico has stated that the government's right to expropriate private property for public use is an inherent and necessary attribute of sovereignty and it is above all property rights. The title thus acquired does not derive its validity from the title of the previous owner, but rather it is a new title, independent and absolute. *Administración de Terrenos de Puerto Rico* v. *Nerashford Development Corp.*, _____D.P.R. _____ (1994), 94 J.T.S. 113, page 82.

According to the doctrine developed by said Court, the just compensation to which the owner of an expropriated property has a right, is that amount that represents the value of the property at the time of seizure. In the absence of a legal definition of this concept of value, the Court has favored the rule of fixing the compensation by determining the market value of the expropriated asset –the price a buyer would be willing to pay in voluntary sale and that a seller would be willing to accept, considering for this the condition of the property at the time of expropriation and the most productive and beneficial use to which it could be dedicated within a reasonable near future, without considering the charges or liens on the property. *Administración de Terrenos de Puerto Rico* v. *Nerashford Development Corp.*, 94 J.T.S., page 82 *E.L.A.* v. *Fonalledas Córdova*, 84 D.P.R. 573, 579 (1962); *Pueblo* v. *Colón*, 73 D.P.R. 579, 584 (1952); *Pueblo* v. *Huyke*, 70 D.P.R. 754, 756 (1950).

Ordinary compensation includes not only the value of the land, but also the value of any structure on same. Pursuant to Art. 287 of the Civil Code, 31 L.P.R.A. sec. 1131, ownership of personal or real property includes the right to accession to everything that joins them or incorporates them, whether it be in a natural or artificial manner; see, also, 31 L.P.R.A. 1161,; see, i.e., R. Elfrén Bernier, *El Derecho de Accesión en Puerto*

Rico, (The Right to Accession in Puerto Rico) Barcelona, 1970.

Nevertheless, subjective and/or speculative factors must be excluded. *Hampton Development Corp.* v. *Estado Libre Asociado de Puerto Rico* 96 J.T.S. 4, page 565; . *Administración de Terrenos de Puerto Rico* v. *Nerashford Development Corp.*, _____D.P.R. _____ (1994), 94 J.T.S. 113, page 82; *Olivero* v. *Autoridad de Carreteras*, 107 D.P.R. 301, 306-307 (1978); *Pueblo* v. *McCormick, Alcaide & Co.*, 78 D.P.R. 939, 958 (1956); see also, 32 L.P.R.A. sec 2915.

The Government did not just seize the properties by the direct execution of its power of eminent domain. This also happens when the owner is deprived of the complete use of his/her property, by regulations, or when the Government invades or allows a third party to physically invade the property. *Culebra Enterprises Corp.* v. *Estado Libre Asociado de Puerto Rico.* _____D.P.R. _____ (1997), 97 J.T.S. 128, pages 105-106; *Hampton Development Corp.* v. *Estado Libre Asociado de Puerto Rico,* _____D.P.R. _____(1995), 96 J.T.S. 4, pages 559-561.

When there is a seizure without the Government having presented an action for expropriation, the owner of the property has an inverse action of expropriation to obtain the corresponding compensation. The same principles are applicable to this as those that govern the action of expropriation initiated by the Government. *Culebra Enterprises Corp.* v. *Estado Libre Asociado de Puerto Rico.* 97 J.T.S. page 111; *Hampton Development Corp.* v. *Estado Libre Asociado de Puerto Rico,* 96 J.T.S. 4, page 559; *Sucn. García* v. *Aut. Carreteras*, 114 D.P.R. 676, 678 (1983); *Flamboyán Gardens* v. *Junta de Planificación*, 103 D.P.R. 884 (1975); *Heftler International, Inc.* v. *J. de P.*, 99 D.P.R. 467, 474 (1970).

The State's obligation to compensate starts from the time of the seizure. *Culebra Enterprises Corp.* v. *Estado Libre Asociado de Puerto Rico*. 97 J.T.S. page 111; *Pamel Corp.* v. *E.L.A.*, 124 D.P.R. 853, 856 (1989); *E.L.A.* v. *Northwestern Const. Inc.*, 103 D.P.R. 377, 382 (1975); *Planta de Cal Hicaco* v. *Tribunal Superior*, 103 D.P.R. 385, 387 (1975).

The Government's delay in payment for the seizure of the property is offset by imposing interest. *Estado Libre Asociado* v. *Rexco Industries*, D.P.R. _____ (1994), 94 J.T.S. 151, page 514, cf. 32 L.P.R.A. sec. 2907.

In the situation before us, as reflected in the record, H.P.Y. and the Mercado Riera Estate have been deprived of the possession of their properties from the time they were illegally occupied in 1985. From the point of view of said parties, their property has continued to be "seized" since then.

Although the Commonwealth of Puerto Rico initially carried out actions aimed at evicting the squatters, this policy changed, and at least from 1988, it determined the permanence of the Punta Diamante Community and the compensation for the owners of the affected properties.

The Mercado Estate received compensation for the 199 *cuerdas* included in Case KEF88-0418, but not for the 17 additional *cuerdas* that were also illegally occupied. H.P.Y. did not receive any compensation whatsoever for its 90.003 *cuerdas*.

In its resolution, the distinguished Court of Instance concluded that it was not until May 14, 1996 that the Government decided to seize all the properties. At that time, the structures and improvements had been made on the properties many years before, but there was a judgment against the squatters issued by the Court of First Instance on September 4, 1992, in which it was concluded that the squatters were *malae fidei* builders. The Court concluded that, under these circumstances, the owners of the properties had

the right to make the structures theirs and that the Government had the obligation to pay for same.

We believe that *this result is unreasonable. It* is a matter of imposing on the Government the cost, not of some temporary structures, but of an urban development where more than one thousand families lived, built more than ten years ago by the people in whose name the Government is exercising its power of eminent domain, including the payment for streets, sewers and other infrastructure built by the government agencies. As reflected in the record, H.P.Y. has claimed that the value of said improvements is ten million dollars ($10,000,000.00), which far exceeds the cost of the occupied land.

Contrary to the Court of First Instance, we believe that, as a question of law, the seizure of the properties did not occur on May 14, 1996, but much before this date. The occupation of the H.P.Y. and the Mercado Estate properties had the sanction of the government since, at least, the 3rd of November 1988, when the Expropriations Division granted title to the Government for a portion of the occupied lands. As pointed out, as of that moment the government agencies dedicated themselves to developing different facilities of infrastructure to make viable the community that had been organized in the area as a result of the invasion. These measures, which gave the occupation the character of Government action, included all the occupied lands, even those that were supposedly not involved in the expropriation proceedings.

In effect, the construction of infrastructure facilities by the Government on lands belonging to the appellees, in this case, constituted an unequivicable act of domain, which signified the transfer of the ownership rights of H.P.Y. and the Mercado Riera Estate to their lands. As of that moment, the appellees had the right to be compensated for the seizure of their property under Section 9 of Article II of the Constitution. *Culebra Enterprises Corp.* v. *Estado Libre*

Asociado de Puerto Rico. 97 J.T.S., page 111; *Hampton Development Corp.* v. *Estado Libre Asociado de Puerto Rico,* 96 J.T.S. page 559.

The Court of First Instance concluded that the seizure of the properties had not been done by the Government, in view of the repeated allegations of the attorneys for the Commonwealth of Puerto Rico in Case KEF88-0418 that it did not want to expropriate the H.P.Y. properties.

But one thing is what the Government does and another thing is what its attorneys can say to a Court. The fact that the Government can allege, in a given situation, that it has not violated the rights of a citizen, is not dispositive nor relieves for a Court to determine whether, in effect, said violation was committed and, if it was, to proceed to remedy same.

In the case at bar, the statement by the Government made on May 14, 1996 that it would pay the owners for all the land occupied by the squatters is not the root of the problem, but rather the consequence. Having sanctioned the occupation of the properties of the appellees, the Government had become a participant in the seizure and, therefore, was obligated to return the lands or to compensate the owners for same.

From the point of view of H.P.Y. and the Mercado Riera Estate, there is no difference between the fate of the properties that were invaded and compensated in Case No. KEF88-0418 and the lands that were not compensated in said proceedings. The truth is that all these properties escaped the possession of their owners in 1985 and were subsequently developed, under the auspices of the Government, as part of the Punta Diamante Community.

The distinction between both groups of properties, in this way, does not stem from the facts nor in the fate that the properties in question have suffered, but rather lies solely in a procedural distinction introduced in Case No. KEF88-0418,

between the properties that form part of said case and those that were supposedly excluded.

But the fact that the Government did not previously admit its obligation to compensate the owners of the properties for all of the properties occupied, does not mean that said obligation did not exist. Even if the properties had been returned to their owners, the Government would possibly have had the obligation to compensate the appellees for the seizure. *Culebra Enterprises Corp.* v. *Estado Libre Asociado de Puerto Rico*. 97 J.T.S. page 111; *Hampton Development Corp.* v. *Estado Libre Asociado de Puerto Rico*, 96 J.T.S., page 559.

It is important to note that by expropriating the 199 *cuerda* property involved in Case No. KEF88-0418, the Government did *not* pay for the buildings constructed by the squatters nor for the infrastructure works made by the agencies. The fact that said proceedings did not include all of the properties seized should not lead to the use of different criteria to compensate for the properties before us now, and that are in the same situation as the previous ones. As indicated, the Government's delay in payment for the seizure of the property is offset by imposing interest. *Estado Libre Asociado* v. *Rexco Industries*, 94 J.T.S., page 514; 32 L.P.R.A. sec. 2907, not broadening the parameters of the appraisal of the real property.

It should be noted that the law that governs forced expropriations by the Government specifically stipulates that the indemnification to be granted "shall not include any increase whatsoever because of public improvements or investments made by the Commonwealth of Puerto Rico in the place through any of its executing departments, agencies or instrumentalities." 32 L.P.R.A. sec. 2915.

The Court of First Instance refused to apply said precept in the case at bar. It concluded that the Commonwealth of

Puerto Rico had acted in bad faith since it knew that the H.P.Y. properties had been invaded, in spite of which said party insisted that same were not part of the expropriation, to later intervene in the proceedings to execute the eviction judgment, alleging the contrary.

We respect the decision of the Court of First Instance that the procedural conduct shown by the Commonwealth of Puerto Rico in this case was reckless and contradictory. Our legal system, nevertheless, generally protects the Government from the adverse consequences that this type of conduct would entail for a private party. *Catalytic Ind. Maint. Co.* v. *F.S.E.*, 121 D.P.R. 98, 114 (1988); *De León* v. *Sria de Instrucción*, 116 D.P.R. 687, 688-689 (1985); *Colondres Vélez* v. *Bayrón Vélez*, 114 D.P.R. 833, 841-843 (1983). The fact that the government may have acted recklessly by insisting that it was not obligated to compensate H.P.Y. for the property of said party that had been invaded, however, does not change our conclusion that, from the point of view of the constitution, said seizure had indeed been carried out and that the Government was obligated to compensate H.P.Y. for same.

It is interesting to note that, in spite of the repeated statements of the Commonwealth of Puerto Rico in Case No. KEF88-0418 that it did not want to expropriate the H.P.Y. properties, the record contains numerous indications that reflect the understanding of the parties who intervened in the dispute to the effect that the public policy of the Government was to preserve the Community.

This was the understanding of the agencies that participated in developing the infrastructure, that made improvements on the properties, including the H.P.Y. property, which was supposedly not included in the expropriation.

The expropriation plan, as we have indicated, did include the H.P.Y. properties. The Expropriations Court was told that this was due to an error by the surveyor. Nonetheless, this "error" was never corrected, in spite of the fact that the Court so ordered.

The partial judgment handed down by the Court on the 7th of May, 1990 in Case No. CS85-1459, setting aside the claim for damages filed by the Mercado Riera Estate against the Commonwealth of Puerto Rico, also refers, as one of the grounds for the dismissal, to the belief that "all, including ... the Estate," that the property in dispute was "part of what had already been expropriated."

Another convincing fact is the resistance of the Court of First Instance to enforce the eviction judgment issued by said forum on June 4, 1991. The Court of First Instance refused to enforce this order for more than seven years, notwithstanding the constant pleas of the appellees to do so. This was possibly not due to any negligence in exercising its authority, but rather to the wise perception of the Court of First Instance that said result was contrary to the public policy adopted and the government's record vis-à-vis the squatter community.

The initial peroration of the Court in the appealed resolution of August 14, 1998 shows that its purpose was to ensure the permanence of the community.[7]

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[7] The announcement in open court on May 14, 1996 by the Development and Urban Housing Improvements Administration that the Government had to compensate the owners for all of the properties occupied, in this sense, responded to the numerous and active measures taken by the Court to persuade the agencies to comply with their responsibilities to the latter. We believe that even if the distinguished Division had not been successful in this matter, the Court had enjoyed the authority to impose on the Government the compensation required under Section 9 of Art. II of the Constitution.

The favorable attitude of the Court of First Instance toward the squatters on the properties, who, after all, are direct cause of the problem, which clearly contrasts with the critical tone taken on by the appealed Division against the Commonwealth of Puerto Rico, which is making a substantial monetary investment to ensure the residents of Punta Diamante that they will remain in their homes.

In our opinion, there is a balance of interests. The interests of H.P.Y. and of the other owners, in this sense, is to receive an appropriate value for their property rights. Said interest must be weighed against the social goal of making viable the stay of a community of more than one thousand families, a purpose which, although it does not eliminate the rights of the appellees, must be given dominant consideration. See, *The Richards Group* v. *Junta de Planificación*, 108 D.P.R. 23, 34-35 (1978).

Although the procedural attitude assumed by the Commonwealth of Puerto Rico in this case is far from being exemplary, we do not believe that said party should be "penalized" by the imposition of payment for improvements and structures that the appellees did not build. We agree with the appellant in that, in the circumstances in the case at bar, the imposition on the Government of a payment of millions of dollars for these items would constitute an unfair enrichment for the owners of the properties. *Hatton* v. *Municipio de Ponce*, _____ D.P.R. _____ (1994), 94 J.T.S. 2, page 11,432; *Ortiz Andujar* v. *E.L.A.*, 122 D.P.R. 817, 823 (1988).

It should be noted, on the other hand, that most of the procedural confusion in the case before us was due to the decision of the appealed Court and by the Expropriations Division to not consolidate the case at bar with Cased to KEF88-0418. Said determination, which possibly responded to considerations of procedural economy, or to a specialized view of the expropriation procedures, made it possible to exclude H.P.Y. from Case No. KEF88-0418, in spite of the

fact that said party was clearly a party affected by the expropriation.

The Commonwealth of Puerto Rico's acquisition of most of the invaded properties, on the other hand, was not taken into account in Case No. CS85-1459, in spite of the fact that it meant that the owners of the properties no longer had a cause of action against most of the occupants of the properties. Said case continued being heard as a class action although it was foreseeable that the judgment handed down by the Court could not be executed, given the uncertainty of who the parties affected by same were.

The peculiar procedural situation of the lawsuit implied that the Commonwealth of Puerto Rico and H.P.Y. did not dispute their differences with a legal arbitrator, but it was not until after the expropriation of Case No. KEF88-0418 had been carried out and the eviction judgment had been issued. It was not until this time that the boundaries of the property expropriated by the Commonwealth of Puerto Rico and the H.P.Y. properties were finally cleared up, indicating that there is a substantial portion of the lands occupied, compensation for which has not been paid by the Commonwealth of Puerto Rico.

The distinguished Court of Instance understood that its analysis of the dispute between H.P.Y. and the Commonwealth of Puerto Rico was governed by what was decided in the judgment issued on June 4, 1991, but it is questionable whether said judgment can be invoked by the Commonwealth of Puerto Rico, which does not appear to have in the eviction trial

According to the Court of First Instance, the aforementioned judgment adjudged that the squatters were *malae fidei* builders and that the owners of the properties had the right to take over the constructions and improvements by

accession.[8] Nevertheless, the truth is that the Commonwealth of Puerto Rico has not litigated these points with the appellees, with the possibility that, if it does, a different determination would be reached. The record reflects, for example, that the improvements made to the appellees' properties by the agencies were openly built without the owners protesting same, which, in light of Art. 300 of the Civil Code, 31 L.P.R.A. sec. 1167, could imply that they also acted in bad faith.

We conclude that, contrary to the decision of the Court of First Instance, H.P.Y. and the Mercado Riera Estate did not have the right to payment for the construction and improvements made on their properties. Compensation to said parties for the Government's delay in paying them for the property seized to develop the Punta Diamante Community constitutes the corresponding legal interest on the value of the property, which must be set as of November 3, 1988 when the Expropriations Division granted title to the Government for the lands involved in Case No. KEF88-0418.

2. The Commissioner's appraisal report.

The appellant also maintains that the Court of First Instance erred in approving the Commissioner's report. In summary, the Commonwealth of Puerto Rico alleges that the Special Commissioner erred by including in his analysis the sale value of the two properties that allegedly do not compare with the plot of land belonging to the appellee, H.P.Y.

As indicated, the Supreme Court of Puerto Rico has stipulated that the establishment of the just compensation for a property is by determining the market value of the expropriated property, through comparable sales. *Administración de Terrenos de Puerto Rico* v. *Nerashford*

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[8] We have examined said determination and it is not clear.

Development Corp., 94 J.T.S., page 82; *E.L.A.* v. *Fonalledas Córdova*, 84 D.P.R. page 579.

This is a determination that was entrusted, in the first instance, to the discretion of the Court. *E.L.A.* v. *Soc. Civil Agrícola e Industrial*, 104 D.P.R. 392, 398 (1975). The appeals courts only intervene in this determination when the amount granted is unreasonably high or ridiculously low, *Culebra Enterprises Corp.* v. *Estado Libre Asociado de Puerto Rico*. 97 J.T.S. page 108, or when there is not sufficient support for the evidence submitted; *Pueblo* v. *Amadeo*, 82 D.P.R. 102, 122 (1961); *Estado* v. *Bravo*, 79 D.P.R. 779, 787 (1956).

The determination of the just compensation that the Government must pay for forced expropriation is essentially more a legal and legislative exercise. *Estado Libre Asociado* v. *Rexco Industries*, 94 J.T.S., page 514. The establishment of said value requires the precise synchronization of several factors, and in the final analysis, a healthy between the owners' rights and the demands of the community. *E.L.A.* v. *Fonalledas Córdova*, 84 D.P.R. page 579.

In the case at bar, the parties agreed that the value in question was determined, in the first instance, by a commissioner selected by agreement between the parties. Since this is essential a question of expertise, this course of action was allowed by Rule 41 of the Civil Procedures, 32 L.P.R.A. Ap. III, R. 41, *Vélez Ruiz* v. *E.L.A.*, 111 D.P.R. 752, 757 (1981).

The Commissioner submitted a report, concluding that the market value of the H.P.Y. property amounted to $3,418,508.80, equivalent to a value of $9.50 per meter.

The Commonwealth of Puerto Rico questions this determination, alleging that the Commissioner considered the sale of other properties, which because of their topography and circumstances, were not comparable to the property in

dispute. In particular, it alleges that properties with residential development approved were considered, which considerably increases their value.

The Supreme Court of Puerto Rico has made it clear that the sale of plots that are supposedly similar to the one expropriated is inadmissible only when the surface area and the topography and location of said plots is not really similar to the expropriated property. *E.L.A.* v. *317.813 Cuerdas de Terreno*, 84 D.P.R. 1, 10 (1961), *Pueblo* v. *Colón*, 73 D.P.R. 579, 583 (1952).

In the case at bar, just like the Court of First Instance, we have examined the report of said expert and we do find anything that convinces us to substitute his criteria.

We should note that we are not dealing with a direct determination of the Court of First Instance, but rather with one by the Commissioner, whose expertise has been recognized by both parties. The scope of our review, therefore, must necessarily be more limited.

In this sense, Rule 41.5(b) of the Civil Procedures stipulates that "in all cases, the Court shall accept the findings of fact of the commissioner, unless they are clearly erroneous." 32 L.P.R.A. Ap III, R. 45.1(b). *Vélez Ruiz* v. *E.L.A.*, 111 D.P.R. pages 757-758; *Lebrón* v. *P.R. Lt. & P. Co.*, 78 D.P.R. 683, 687-689 (1995). We do not understand that the imputed error was committed.

We have concluded, however, that the seizure of the properties in question occurred on November 3, 1988 and not on May 14, 1996, as determined by the Court of First Instance. Said conclusion could call for an adjustment in the Commissioner's report in order to take the value of the property at that date into consideration.

Thus, the report shall be returned to the Court of First Instance to be adjusted accordingly.

In view of the grounds set forth, the record is issued and the appealed resolutions are set aside. In their place, it is ordered that the Commonwealth of Puerto Rico has no obligation to pay the appellees for the construction and improvements on the properties, but rather interest, at the legal rate as of November 3, 1988. The report of the Commissioner is returned for the consideration of the Court of First Instance so any revision that said court deems appropriate may be made.

The record shall be returned to the Court of First Instance for the continuation of the proceedings that are consistent with this judgment.

The Court hereby states and orders and the General Clerk certifies it.

[Signed]

GLADYS E. ORETEGA RAMIREZ
DEPUTY GENERAL CLERK
Aida Ileana Oquendo Graulau
General Clerk

COMMONWEALTH OF PUERTO RICO
GENERAL COURT OF JUSTICE
CIRCUIT COURT OF APPEALS
REGIONAL V CIRCUIT/PONCE-AIBONITO

CIVIL NO. KLCE199801051
SUBJECT: CERTIORARI CIVIL INTERLOCUTORY

UNITED STATES OF AMERICA
THE PRESIDENT OF THE U.S.A
COMMONWEALTH OF PUERTO RICO

COMMONWEALTH OF PUERTO RICO

vs.

MARIO L. MERCADO ESTATE

FRANCISCO AMUNDARAY RODRIGUEZ
PO BOX 9023980
SAN JUAN PR 00902-3980

NOTICE OF JUDGMENT

THE UNDERSIGNED CLERK HEREBY NOTIFIES YOU THAT THIS COURT HAS HANDED DOWN JUDGMENT IN THE ABOVE-CAPTIONED CASE DATED AUGUST 27, 1999, WHICH HAS BEEN DULY RECORDED AND FILED IN THE RECORDS OF THIS CASE, WHERE YOU MAY FIND THE DETAILS OF THE TERMS OF SAME.

AND BEING OR REPRESENTING THE PARTY INJURED BY THE JUDGMENT, FOR WHICH THE REMEDY OF APPEAL MAY BE ESTABLISHED, I ADDRESS THIS NOTICE TO YOU, HAVING FILED IN THE RECORDS OF THIS CASE A COPY OF SAME, DATED SEPTEMBER 23, 1999.

DACO – PO BOX 41059 MINILLAS STATION SAN JUAN

DEVELOPMENT AND HOUSING IMPROVEMENTS ADM. – PO BOX 21365 SAN JUAN

GENERAL CLERK PONCE (SUP) – JUDICIAL CENTER OF PONCE PO BOX 33179

DEPT. OF SOCIAL SERVICES – LEGAL DIVISION PO BOX 11398 SAN JUAN

DEPT. OF HOUSING – PO BOX 21365 SAN JUAN

JOSE R. MENDEZ PURCELL – 47 CRISTINA STREET PONCE

RAFAEL ELVIRA CABALLERO F-7 FAGOT AVE. PONCE

JUAN RAMIREZ RIVERA – PO BOX 720 MAYAGUEZ

SAMUEL TORRES CORTES – PO BOX 335072 PONCE

GILBERTO LIMARDO RODRIGUEZ – PO BOX 30226 PONCE

EDGARDO SANTIAGO LLORENS – EL SENORIAL 415 #10 SALUD STREET PONCE

RAFAEL CORDERO SANTIAGO – PO BOX 1709 PONCE

FELIX J MALDONADO RODRIGUEZ – JARDINES DEL CARIBE DEVELOPMENT STREET 15 JJ-9 PO

EDWIN ING. QUINTERO BETANCOURT – PO BOX 21365 SAN JUAN

JULIO C. RIOS – 832 BELLAS LOMAS DE PROVIDENCI MAYAGUEZ

ATTY. CELIA MOLANO FLORES – OFFICE OF THE ATTORNEY GENERAL PO BOX 90201

SAN JUAN, PUERTO RICO, SEPTEMBER 23, 1999.

AIDA ILEANA OQUENDO GRAULAU

CLERK

BY: *CARMEN C. RAMIREZ MELENDEZ*
DEPUTY CLERK COURT II
OAT 704 – NOTICE OF JUDGMENT

APPENDIX G

IN THE SUPREME COURT OF PUERTO RICO

FEB 14 PM 2:21

No. AC-99-65

COMMONWEALTH OF PUERTO RICO
Plaintiff—Appllee

v.

MARIO L. MERCADO ESTATE, ET AL
Defendants—Appellants

CERTIORARI

RESOLUTION

San Juan, Puerto Rico, January 21, 2000.

Having considered the remedy filed as certiorari, it is hereby dismissed.

The Court agreed and the Clerk of the Supreme Court certifies. Associate Judge Hernández Denton did not intervene.

[Illegible signature]
Isabel Llompart Zeno
Clerk of the Supreme Court

APPENDIX H

IN THE SUPREME COURT OF PUERTO RICO

MARCH 2 AM 9.55

NO. AC-99-65

COMMONWEALTH OF P. R., *et al.*
Plaintiffs-Appellees

v.

MARIO L. MERCADO ESTATE, H.P.Y., INC. *et al.*
Defendants-Appellants

RESOLUTION

San Juan, Puerto Rico, February 25, 2000.

The first motion of reconsideration is dismissed.

The Court agreed and the Clerk of the Supreme Court certifies.

[illegible signature]
ISABEL LLOMPART ZENO
Clerk of the Supreme Court

APPENDIX I

IN THE SUPREME COURT OF PUERTO RICO

No. AC-1999-65

COMMONWEALTH OF P. R., *et al.*
Plaintiffs-Appellees

v.

MARIO L. MERCADO ESTATE, H.P.Y., INC. *et al.*
Defendants-Appellants

RESOLUTION

San Juan, Puerto Rico, March 17, 2000.

The second motion of reconsideration is dismissed.

The appellants, Mario L. Mercado Estate, H.P.Y,. Inc., et al. shall abide [by the decision].

The Court agreed and the Clerk of the Supreme Court certifies.

APPENDIX J

UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

No. 92-2370

HPY, INC.,
Plaintiff-Appellant,

v.

ELECTRIC POWER AUTHORITY, *ET AL.*,
Defendants-Appellees.

April 15, 1993, Decided

JUDGES: Before Cyr, Circuit Judge, Boudin, Circuit Judge, and Burns, * Senior District Judge.

OPINION BY: PER CURIAM

OPINION:

Per Curiam. HPY, Inc., brought this action under 42 U.S.C. § 1983 against three public authorities in Puerto Rico, certain of their officials, and John Does 1 through 1,000. The agencies are the Electric Power Authority, the Puerto Rico Aqueduct and Sewer Authority and the Rural Housing Administration. The heart of the complaint was the following allegation:

On or about 1985, squatters, without valid title or authorization from the plaintiff started massive land invasions on said properties [belonging to plaintiff]. The squatters, also

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* Of the District of Oregon, sitting by designation.

Defendants of [sic] this suit, encouraged and abetted by the other Defendants, proceeded to construct or build shacks and houses on Plaintiff's properties.

This, said the complaint, comprised a deprivation of property rights "without due process and without due compensation."

The defendants moved to dismiss the complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). In opposing the motion, HPY offered a few more factual allegations. Specifically, it alleged that squatters had occupied its land and that some or all of the named defendants had encouraged the invasion and abetted the squatters by supplying public facilities like power to the squatters and even constructing or assisting the squatters to construct shacks. The district court ultimately dismissed the complaint, with prejudice, for failure to state a claim, observing that "we are as likely to squeeze blood from a stone as we are to squeeze any more facts from this complaint . . . ." HPY appeals.[1]

1 After filing its brief with this court, HPY filed two informative motions. One motion amended a page reference included in its brief; the second provided us with supplemental support for its argument. We grant both motions.

We affirm the district court. Section 1983 creates a claim for injuries done by anyone who "acting under color of" state law deprives the victim of any "rights, privileges, or immunities" protected under the Constitution. The original complaint did not explain what the named defendants had

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[1] After filing its brief with this court, HPY filed two informative motions. One motion amended a page reference included in its brief; the second provided us with supplemental support for its argument. We grant both motions.

done under color of state law, but we will take the complaint on this appeal as illuminated by HPY's oppositions to the motions to dismiss. Even in this posture, and allowing HPY the benefits of liberal pleading rules, 5 Wright & Miller, Federal Practice and Procedure § 1219 (1990), we cannot see how HPY can premise a claim under section 1983 upon the facts alleged.

We will assume arguendo that the color of state law requirement is met as to the named defendants (since they are governmental entities and officials) and that HPY's property has been physically occupied and its value diminished. But if the actions of the named defendants are not authorized by local law or regulation, then there is no constitutional violation so long as local law affords a remedy for any tortious misconduct. Hudson v. Palmer, 468 U.S. 517, 533 (1984) (unauthorized property seizure of state employees not a constitutional deprivation if state remedy afforded). Defendants assert that there is a remedy under local law, 32 L.P.R.A. § 3077. HPY neither alleged the absence of such a remedy in the complaint nor countered defendants' assertion in this court (HPY did not file a reply brief).

Alternatively, if HPY is alleging that the abetting of the trespass is authorized by Puerto Rican law, conceivably a taking claim would arise and the Constitution would require compensation. But again there is no constitutional deprivation so long as Puerto Rico provides an appropriate remedy to secure compensation for takings. Williamson Planning Commission v. Hamilton Bank, 473 U.S. 172, 194 (1985). [*5] Once again, the defendants assert that such a remedy exists under Puerto Rican law, see Culebras Enterprises Corp. v. Rivera Rios, 813 F.2d 506, 513 (1st Cir. 1987), and once again there is no contrary allegation in the complaint and no counter to defendants' assertion by way of reply brief.

HPY also complains that the dismissal should have been without prejudice in light of the liberal leave-to-amend

policies followed by the courts. Here, however, HPY filed an utterly uninformative complaint. We have effectively treated the additional material scattered in its three oppositions filed in the district court as amendments to the complaint. Even so, HPY has still failed to state a claim, nor has it filed a reply in this court responding to the authorities just recited (which were set forth in the answering briefs). Accordingly, we do not think that the dismissal with prejudice represents an abuse of discretion.

Affirmed.